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# Comparative Study of International Commercial Arbitration in England, Japan and Russia

Ikko Yoshida

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ABSTRACT OF THESIS

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Name of Candidate Ikko Yoshida  
 Address [REDACTED]  
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This thesis examines the law on international commercial arbitration in England, Japan and Russia with a view to identify those areas for which harmonisation is of the greatest practical importance. This study is a timely one, since the Arbitration Act 1996 came into effect on 1st January 1997 in England. In Japan, the Committee of Arbitration formed by Japanese experts on arbitration prepared the Draft Text of the Law of Arbitration in 1989, and preparation for amendment based on the UNCITRAL Model Law is under way. In Russia, the Law on International Commercial Arbitration was established based on the UNCITRAL Model Law on 7th July 1993.

A comparative study is made of the rules of international private law relating to arbitration, especially issues on international jurisdiction. Despite of recent development of unification of law on arbitration such as the 1958 New York Convention and the UNCITRAL Model Law, there are few rules in this area. This study goes some way towards filling this gap in the legal framework.

The classification of an arbitration agreement and its influences upon international private law and law on arbitration are also considered. The issue of classification has been argued by many commentators usually to attempt to clarify the general characteristics of arbitration. However, it is the classification of an arbitration agreement that has practical significance. The classification of an arbitration agreement affects, directly or indirectly, not only the international private law but also law on arbitration. Its effects extend to the law applicable to an arbitration agreement, the law applicable to the capacity of a person to enter into an arbitration agreement, the principle of separability of an arbitration agreement, assignment of an arbitration agreement, the principle of Kompetenz-Kompetenz, and the stay of court proceedings on the basis of the existence of an arbitration agreement.

Finally, this comparative study is used as a basis to put forward models for harmonisation in the interpretation of law on arbitration.

The following articles, in which certain materials are also covered in this thesis, have been published with the approval of the supervisor (Regulation 3.8.3):

- 1 "Determination of the Seat of Arbitration under the Arbitration Act 1996." Arbitration: The Journal of the Chartered Institute of Arbitrators. Vol. 64, No. 4, 1998: pp. 292-294.
- 2 "Lesson from the Atlantic Emperor: Some Influence from the Van Uden Case." Arbitration International. Vol. 15, No. 4, 1999: pp. 359-380.
3. "Separability of an Arbitration Agreement in Russia." Arbitration International. Vol. 16, 2000.

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# Outline

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## Abbreviations

(Since some abbreviations are same or very similar in different countries, adjectives of English, Japanese and Russian will be added to the abbreviation if it is difficult to distinguish one from another)

### I. England

LCIA (the London Court of International Arbitration)

Citation of legislation follows the official short title.

### II. Japan

#### II-A. Abbreviation of Law and Arbitral Institution

JCAA (the Japan Commercial Arbitration Association)

Law on Arbitration (Law on Procedure on Public Notice and Arbitration established on 21st April 1890)

CC (the Civil Code established on 27th April 1896)

1890 CPC (the Civil Procedure Code established on 21st April 1890)

1996 CPC (the Civil Procedure Code established on 26th June 1996)

Law on the CE (the Compulsory Execution Law established on 30th March 1979)

Rules on the CE (the Rules of the Supreme Court on Compulsory Execution issued on 8th November 1979)

Law on the AL (Law on the Application of Laws (Hôrei) issued on 21st June 1898)

Translation of Civil Code, Commercial Code and Law on the Application of Laws is basically taken from *Basic Japanese Laws* (Oda, Hiroshi ed. Oxford: Clarendon Press, 1997).

## II-B. Precedents

### II-B-1. Explanation of Precedents

Citation of precedents follows the rules observed in Japanese juridical periodicals, Hôritsu-jihô-bunken-geppô. The orthography of Japanese words in the Roman letters is based on the Notification No. 1 of the Japanese Cabinet on Orthography of the Roman Letters on 9th December 1954. According to this Notification, a long vowel is showed by “ ^ ” above the letter, however some Japanese words which have become English words such as Tokyo (Tôkyô) are written in the English manner.

ex. *Tokyo-chi-han* S34.8.20 (Ka-min-shû. Vol. 10, No. 8, p.1711) (Tokyo District Court's Judgement on 20th August 1959).

“*Tokyo-chi-han*” identifies the court and “S34.8.20” stands for the date when the judgement was issued. However, opposite to the English way, S34.8.20 means 20th August 1959. “S” with the others, M, T and H, mean the period of a Japanese emperor:

M = Meiji (Period of Meiji Emperor M1 (1868) - M45 (1912))

T = Taishô (Period of Taishô Emperor T1 (1912) - T15 (1926))

S = Shôwa (Period of Shôwa Emperor S1 (1926)- S64 (1989))

H = Heisei (Period of Heisei Emperor H1 (1989) -

“Ka-min-shû. Vol. 10, No. 8, p. 1711” identifies the source of the judgement.

## II-B-2. Abbreviation of names of courts

Dai-han = Daishin-in hanketsu (Great Court of Judicature's Judgement)

Sai-han = Saikô-saiban-sho hanketsu (Supreme Court's Judgement)

Tokyo (Names of place)-kô-han = Tokyo Kôtô-saiban-sho hanketsu (Tokyo High Court's Judgement)

Tokyo-chi-han = Tokyo Chihô-saiban-sho hanketsu (Tokyo District Court's Judgement)

## II-B-3. Abbreviation of Names of Source

Han-ji (Hanrei-jihô)

Han-ta (Hanrei-taimuzu)

Hyôron (Hôritsu-gakusetsu-hanrei-hyôron-shû)

Ka-min-shû (Kakyû-saiban-sho-minjisai-habrei-shû)

Min-roku (Daishin-in-minji-hanketsu-roku)

Min-shû (Daishin-in (Saikô-saiban-sho) -minji-hanrei-shû)

Shinbun (Hôritsu-shinbun)

# III. Russia (Law and Source)

## III-A. Arbitral Institution

FTAC (Foreign Trade Arbitration Commission attached to the USSR Chamber of Commerce and Industry)

AC (Arbitration Court attached to the USSR Chamber of Commerce and Industry)

ICAC (the International Commercial Arbitration Court attached to the Russian Federation Chamber of Commerce and Industry)

CCI (Chamber of Commerce and Industry)

## III-B. Law and Rules on Arbitration

1918 Law on Treteiskii Court (the Decree on Treteiskii Court adopted by the Central Executive Committee and the Council of People's Commissars of the USSR on 16th February 1918, Sobranie Uzakonenii i Rasporyazhenii, No. 28, Item 366, 1918).

1924 Statute on Treteiskii Court (the Decree on Treteiskii Court Official Appendix to Chapter XXII of the 1923 CPC adopted by the Central Executive Committee and the Council of People's Commissars of the USSR on 16th

- October 1924, Sobranie Uzakonenii i Rasporyazhenii. No. 73, Item 783, 1924).
- 1932 Statute on the FTAC (the Statute on the FTAC adopted by the Central Executive Committee and the Council of People's Commissars of the USSR on 17th June 1932, Sobranie Zakonov i Rasporyazhenii SSSR. No. 48, Item 281, 1932)
- 1949 Rules on the FTAC (the Rules of Procedure for cases in the FTAC established by the Presidium of the All-Union CCI in 1949)
- 1975 Statute on the FTAC (the Statute on the FTAC adopted by the Presidium of the Supreme Soviet of the USSR on 16th April 1975, Vedomosti Verkhovnogo Soveta SSSR. No. 17, Item 269, 1975)
- 1975 Rules on the FTAC (the Rules of Procedure for cases in the FTAC approved by the Supreme Soviet of the USSR on 16th April 1975, Vedomosti Verkhovnogo Soveta SSSR. No. 29, Item 438, 1975)
- 1982 Rules on the Maritime Arbitration (the Rules of Procedure for Cases in the Maritime Arbitration Commission Attached to the RF Chamber of Commerce and Industry established on 13th January 1982)
- 1987 Statute on the AC (the statute on the Arbitration Court adopted by the Presidium of the Supreme Soviet of the USSR on 14th December 1987, Vedomosti Verkhovnogo Soveta SSSR. No. 50, Item 806, 1987)
- 1988 Rules on the AC (the Rules on the Arbitration Court established by the Presidium of the USSR CCI on 11th March 1988)
- 1992 Law on the Domestic Arbitration (the Temporary Act on Arbitration (qoeqehpihh prd) for Resolving Economic Disputes established on 24th June 1992, Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF. No. 30, Item 1790, 1992)
- 1993 Law on the ICA (the Law on the International Commercial Arbitration enacted by the RF Congress on 7th July 1993, Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF. No. 32, Item 1240, 1993)
- 1994 Rules on the ICAC (the Rules on the ICAC approved by the RF CCI on 8th December 1994)

### III-C. Civil Law and Civil Procedure Law

- 1864 CPC (the Civil Procedure Code established on 20th November 1864)
- 1922 CC (the Civil Code of the RSFSR adopted on 11th November 1922)
- 1923 CPC (the Civil Procedure Code of the RSFSR adopted on 10th July 1923)

- 1961 Principles of CPC (the Principles of the Civil Procedure of the USSR and the Republics adopted on 8th December 1961, Vedomosti Verkhovnogo Soveta SSSR. No. 50, Item 526, 1961)
- 1964 CPC (the Civil Procedure Code of the RSFSR adopted on 11th June 1964, Vedomosti Verkhovnogo Soveta SSSR. No. 24, Item 416, 1964)
- 1961 Principles of CL (the Principles of the Civil Legislation of the USSR and the Republics adopted on 8th December 1961, Vedomosti Verkhovnogo Soveta SSSR. No. 50, Item 525, 1961)
- 1964 CC (the Civil Code of the RSFSR adopted on 11th June 1964, Vedomosti Verkhovnogo Soveta RSFSR. No. 24, Item 416, 1964)
- 1991 Principles of CL (the Principles of the Civil Legislation of the USSR and the Republics enacted on 31st May 1991, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR. No. 26, Item 733, 1991)
- 1994 CC (the Part 1 of the Civil Code promulgated on 30th November 1994, Vedomosti Federal'nogo Sobraniya RF. No. 16, Item 667, 1994, and the Part 2 on 22nd December 1995, Sobranie Zakonodatel'stva RF. No. 5, Item 410, 1996)
- 1968 GCD (the General Conditions for the Deliveries of Goods between Organizations of the CMEA member countries established in 1968)
- 1992 Arbitrazh PC (the Arbitrazh Procedure Code of the RF adopted on 5th March 1992, Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF. No. 16, Item 837, 1992)
- 1995 Arbitrazh PC (the Arbitrazh Procedure Code of the RF adopted on 5th April 1995, Vedomosti Federal'nogo Sobraniya RF. No. 15, Item 588, 1995)
- 1988 Decree on Execution of Foreign Judgements (the USSR Decree on the Recognition and Execution in the USSR of Foreign Judgements and Arbitration Awards adopted on 21st June 1988, Vedomosti Verkhovnogo Soveta SSSR. No. 26, Item 427, 1988)
- 1997 Law on CE (the Law on Compulsory Execution adopted on 4th June 1997, Vedomosti Federal'nogo Sobraniya RF. No. 25, Item 1157, 1997)

### III-D. Public Law

- 1978 Constitution (the Constitution of the RSFSR adopted on 12th April 1978, Vedomosti Verkhovnogo Soveta RSFSR. No. 15, Item 407, 1978)
- 1993 Constitution (the Constitution of the RF established on 12th December 1993)

- 1981 Law on Court Organisation (the Law on Court Organisation of the RSFSR adopted on 8th June 1981, Vedomosti Verkhovnogo Soveta RSFSR. No. 28, Item 976, 1981)
- 1991 Law on the Arbitrazh Court (the Law on the Arbitrazh Court adopted on 4th July 1991, Vedomosti S"ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR. No. 30, Item 1013, 1991)
- 1995 Law on Arbitrazh Courts (the Federal Constitutional Law on Arbitrazh Courts in the RF adopted on 5th April 1995, Vedomosti Federal'nogo Sobraniya RF. No. 14, Item 520, 1995)

## IV. Conventions

- 1923 Geneva Protocol (the Protocol on Arbitration Clause adopted by the League of Nations on 24th September 1923)
- 1927 Geneva Convention (the Convention on the Execution of Foreign Arbitral Awards adopted by the League of Nation on 26th September 1927)
- 1958 New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United nations on 10th June 1958)
- 1961 European Convention (the European Convention on International Commercial Arbitration adopted by the United Nations on 21st April 1961)
- 1954 Hague Convention on Civil Procedure (the Convention on the Civil Procedure signed in Hague in 1954)
- 1965 Hague Convention on the Service Abroad (the Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters signed at the Hague on 15th November 1965).



# Cases

## I. England (Scotland and Some Common Law Countries)

Case	Year	Source	Subject Matter (discussed in this paper)
<i>Male v. Roberts.</i>	1799*	3 Esp. 163; 170 E.R. 574.	Conflict of laws. The contract must be governed by the laws of the country where the contract was made.
<i>Alexander Scott v. George Avery</i>	1856	5 HLC 811; 10 ER 1121.	Stay of court proceedings. "Any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and other party to the covenant."
<i>Sottomayor v. De Barros.</i>	1877*	P.D. 1	Conflict of laws. The capacity to enter into an ordinary commercial contract should be determined by the law of the domicile.
<i>County Theatres and Hotels, Ltd. v. Knowles.</i>	1902	1 KB 480.	Stay of court proceedings. The application of stay must be made before making any step in the action.
<i>Printing Machinery Company, Limited v. Linotype and Machinery, Limited.</i>	1912	1 Ch. 566.	Separability of an arbitration agreement. Issue of rectification of the contract is not referable to arbitration.
<i>Doleman &amp; Sons v. Ossett Corporation.</i>	1912	3 KB 257	Examination of arbitral awards. The court should examine not the original main contract but the arbitral award itself.

## Cases

<i>Parker, Gaines &amp; Co. Ltd. V. Turpin.</i>	1918	1 KB 358.	Stay of court proceedings. The application of stay must be made before making any step in the action.
<i>Czarnikow v. Roth, Schmidt &amp; Co.</i>	1922	2 KB 478.	Alsatia. Scrutton L. J. proclaimed that there must be no Alsatia in England where the King's Writ does not run.
<i>Sanderson's case.</i>	1922	S.C.(H.L.)117.	Separability of an arbitration agreement. Issue of repudiation of the contract is referable to arbitration.
<i>Champsey Bhara &amp; Co. v. Jivraj Balloo Spinning and Weaving Co.</i>	1923	AC 480.	Kompetentz-Kompetentz.
<i>Cottage Club Estates v. Woodside Estate Co. (Amewsham)</i>	1928	2 KB 463	Assignment of an arbitration agreement. Award made before the person who assigned the contractual right containing an arbitration clause was invalid.
<i>First Russian Insurance Company (in Liquidation) v. London and Lancashire Insurance Company, Ltd.</i>	1928	Ch. 922.	Incorporation of foreign law.
<i>Aspell v. Seumour</i>	1929	WN 152.	Assignment of an arbitration agreement. Assignee can make a claim to stay court proceedings.

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<i>Lazard Brothers and Company v. Midland Bank, Ltd.</i>	1932	A.C. 289.	Incorporation of foreign law.
<i>Dennehy v. Bellamy</i>	1938	60 Lloyd's Rep. 269	Assignment of an arbitration agreement. Arbitration must be performed by the assignee under the <i>Scott v. Avery</i> clause.
<i>Pitchers, Ltd. V. Plaza, Ltd.</i>	1940	1 All ER 151.	Stay of court proceedings. The application of stay must be made before making any step in the action.
<i>Heyman v. Darwins</i>	1942	AC 356	Separability of an arbitration agreement. The Court of Appeal recognised the principle of separability.
<i>Baindail (otherwise Lawson) v. Baindail.</i>	1946	P.D. 122.	Conflict of Laws The capacity to enter into an ordinary commercial contract should be determined by the <i>lex loci</i> (the validity of marriage, in this case, was decided by the law of the party's domicile).
<i>Shayler v. Woolf.</i>	1946	Ch. 320.	Assignment of an arbitration agreement If the contract was incapable of assignment, the arbitration agreement could not be assigned.
<i>Central Meat Products Company, Ltd. v. J. V. McDaniels, Ltd.</i>	1952	1 Lloyd's Rep. 562.	Validity of an arbitration agreement. The court construed the meaning of an arbitration agreement.

## Cases

<i>Nicolene I.d. v. Simmonds.</i>	1953	2 W.L.R. 717.	Validity of a contract. A clause which was meaningless should be distinguished from a clause which was yet to be agreed.
<i>Slade v. Metrodent Ltd.</i>	1953	2 LR 112.	Conflict of laws. A minor's capacity to enter into an arbitration agreement was recognised.
<i>Christopher Brown Ltd. v. Genossenschaft Oesterreichischer</i>	1954	1 QB 8.	Kompetenz-Kompetenz. Arbitrator's decision on its own competence was regarded as provisional.
<i>National Gypsum Company, Inc. v. Northern Sales, Ltd.</i>	1963	2 Lloyd's Rep. 499.	Conflict of laws. The law applicable to the arbitration agreement was regarded as the same with the proper law of contract.
<i>Tritonia Shipping Inc. v. South Nelson Forest Products Corporation.</i>	1966	1 Lloyd's Rep. 114.	Validity of an arbitration agreement. The clause, "Arbitration to be settled in London," was recognised as valid.
<i>Hobbs Padgett &amp; Co. (Reinsurance), Ltd. v. J. C. Kirkland, Ltd., and Kirkland.</i>	1969	2 Lloyd's Rep. 547.	Validity of an arbitration agreement. The clause, "Suitable Arbitration Clause," was recognised as valid.
<i>Kathmer Investments Ltd. v. Woolworths (Pty) Ltd.</i>	1970*	2SA 498	Separability of an arbitration agreement. Issue of rectification of the contract was regarded as referable to arbitration.
<i>Ascherberg v. Casa Musicale Sonzogno (Ch.)</i>	1971	1 W. L. R. 173 and 1128	Incorporation of foreign law.

## Cases

<i>Compagnie D'armement Maritime S.A. v. Compagnie Tunisienne De Navigation S.A.</i>	1971	A.C. 572.	Law applicable to an arbitration agreement. Designation of a country did not always mean that the law applicable to the arbitration agreement was the law of that country.
<i>HRH Maharanee Seethaderi Gaekwar of Baroda v. Wildenstein</i>	1972	2 QB 283	Jurisdiction of courts. The service was made on a French who visited the Ascot races.
<i>Vogel v. R and A Kohnstamm Ltd.</i>	1973	1 QB 133	Jurisdiction of courts. The English court did not recognise implied jurisdiction.
<i>Prodexport Co. v. Man Ltd.</i>	1973	1 Q.B. 389.	Arbitrability. Illegality of contract cannot be a basis of jurisdiction of arbitration. Application of foreign law as fact.
<i>Dalmia v. National Bank</i>	1977	2 Lloyd's Rep. 223.	Kompetentz-Kompetentz. Arbitrator's decision on its own competence was regarded as provisional.
<i>Willcock v. Pickfords</i>	1977	1 Lloyd's Rep. 244.	Kompetentz-Kompetentz Kompetentz-Kompetentz was dismissed.
<i>The Theodohos</i>	1977	2 Lloyd's Rep 428	Law applicable to the capacity of a juridical person.
<i>Bremer Vulkan v. South India.</i>	1981	1 Lloyd's Rep. 253.	Stay of court proceedings.
<i>Gola Sports Ltd. v. General Sportcraft Co. Ltd.</i>	1982	Com LR 51.	Jurisdiction of courts. The English court recognised the jurisdiction, but transferred the power to appoint an arbitrator.

<i>The "Pandre Island"</i>	1984	2 Lloyd's Rep. 408	Assignment of an arbitration agreement. Arbitration must be performed by the assignee under the <i>Scott v. Avery</i> clause
<i>Bank Mellat v. Helliniki Techniki S.A.</i>	1984	Q.B. 291	Law applicable to arbitral proceedings. Law must be domestic law of some country.
<i>Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines, The League.</i>	1984	2 Lloyd's Rep. 259.	Assignment of an arbitration agreement.
<i>Turner &amp; Goudy v. McConnell.</i>	1985	2 All ER 34.	Stay of court proceedings. The application of stay must be made before making any step in the action.
<i>Zambia Steel v. Clark &amp; Eaton.</i>	1986	2 Lloyd's Rep. 225	Validity of an arbitration agreement. An arbitration agreement printed on the reverse of a quotation was decided as valid.
<i>Etri Fans Ltd. v. NMB Ltd.</i>	1987	2 All ER 763.	Stay of court proceedings. The party who applies for the stay must be the one who is sued.
<i>The Parouth (C.A.).</i>	1987	2 Lloyd's Rep. 351.	Conflict of laws. Even if the arbitration agreement was disputed, it had the important function of indicating the proper law of the dispute.
<i>Spiliada Maritime Corporation v. Cansulex Ltd.</i>	1987	A.C. 460 (H.L.)	<i>Forum non conveniens.</i>

## Cases

<i>Deutsch Schachtbau- und Tiefbohrgesellschaft v. Ras al-Khaimah National Oil Co. Ltd.</i>	1987	2 Lloyd's Rep. 2466; W.L.R. 1023.	<p>Law applicable to substantive disputes.</p> <p>The Law applicable to an arbitration agreement could be different from that to the main contract.</p> <p>Application of internationally accepted principle of law was recognised.</p>
<i>Ashville Investments v. Elmer Contractors.</i>	1988	2 All ER 577.	<p>Separability of an arbitration agreement.</p> <p>Issue of the initial existence of the contract was regarded as not referable to arbitration.</p>
<i>Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru.</i>	1988	1 Lloyd's Rep. 116.	<p>Law applicable to arbitral proceedings.</p> <p>It was regarded as possible to choose the procedural law outside the place of arbitration.</p>
<i>Mark Rich &amp; Co.A.G. v. Societa Italiana Impianti P.A. (the Atlantic Emperor)</i>	1989	1 Lloyd's Rep. 548. (also No. 2 [1992] 1 Lloyd's Rep. 624)	<p>Jurisdiction of courts.</p> <p>It was disputed whether or not, the term "arbitration" in the Brussels Convention included the issue of the validity or existence of an arbitration agreement.</p>
<i>Bank of Scotland v. Seitz (O.H.)</i>	1989*	S.L.T. 641	<p>Jurisdiction of courts.</p> <p>The Scottish Outer Court applied a Scottish rule of conflict of laws to decide jurisdiction.</p>

## Cases

The “ <i>Jordan Nicolov.</i> ”	1990	2 Lloyd's Rep. 11.	Assignment of an arbitration agreement Notice must be given not only to the other party but also to the arbitrators for the assignment to take full legal effect.
<i>Smith Ltd. v. H&amp;S International.</i>	1991	2 QB (Com. Ct.) 12.	Separability of an arbitration agreement. Issue of Rescission of the contract was regarded as referable to arbitration.
<i>Harbour Assurance Co. (U.K.) Ltd. v. Kansa General Insurance Co. Ltd.</i>	1993	QB 701.	Separability of an arbitration agreement. The court recognised the principle of separability.
<i>Channel Group v. Balfour Beauty Ltd. (H.L.(E.)).</i>	1993	AC 334 at 366.	Stay of court proceedings. Interim injunction based on a foreign arbitration was recognised.
<i>Heidberg.</i>	1994	2 Lloyd's Rep. 287	Jurisdiction of courts.
<i>Phillip Alexander Securities &amp; Futures Ltd. v. Bemberger and Others.</i>	1996	Times, 22nd July 1996; UK Legal Lexis Current Awareness, Halsbury's Laws of England-Monthly Review.	Jurisdiction of courts. The Court of Appeal did not accept the claim to confirm the validity of an arbitration agreement in terms of the EU law.
<i>Shevill v. Presse Alliance.</i>	1996	3 All ER 929 (H.L.).	Jurisdiction of courts. The House of Lords applied an English rule of conflict of laws to decide jurisdiction.



## Cases

<i>Cott UK Ltd. v. F E Barber Ltd.</i>	1997	3 All ER 540.	Expert Determination.
<i>Alfred C Toepfer International GmbH v. Société Cargill France.</i>	1998	CLC 198.	Jurisdiction of courts. Injunction restraining the party from pursuing the court proceedings was sought.
<i>ABB LUMMUS Global Limited v. Keppel Fels Limited.</i>	1998	12 Construction Law Newsletter 3.	Jurisdiction of courts. When the procedural law of an arbitration is to be the law of X, X is to be the seat of arbitration.
<i>Azov Shipping Co. v. Baltic Shipping Co.</i>	1999	2 Lloyd's Rep. 159.	Conflict of laws. Capacity of a juridical person to enter into an arbitration agreement was discussed.
<i>Saab and Another v. Saudi American Bank.</i>	1999	Times 29th July p. 26.	Jurisdiction of courts. Companies with a branch in Great Britain can be only served on the ground that the cause of action is related to the business being carried on at its branch.

(The Year is the one cited in square bracket [ ], in which the date is an essential part, and it is difficult to find the report without the date. The year cited in round bracket ( ) and Scottish or other common law countries' references are shown with \*.)

## II. Japan

Case	Year	Source	Subject Matter (discussed in this paper)
<i>Osaka-ku-han</i> T6.4.30.	1917	<u>Shinbun</u> . No. 1268: p. 23.	Assignment of an arbitration agreement. Assignment was dismissed.

## Cases

<i>Dai-han</i> T7.4.15	1918	<u>Min-roku</u> . Vol. 24, 1918: p.865.	Classification of an arbitration agreement An arbitration agreement was regarded as a contract not under a substantive law but under the Civil Procedure Code.
<i>Tokyo-chi-han</i> T7.10.19.	1918	<u>Hyôron</u> . No. 7: p. 394.	Assignment of an arbitration agreement. Assignment was recognised.
<i>Tokyo-kô-han</i> T11.4.29.	1922	<u>Shinbun</u> . No. 2005: p. 17.	Stay of court proceedings.
<i>Tokyo-kô-han</i> S10.8.5.	1935	<u>Shinbun</u> . No. 3904: p.5.	Conflict of laws. Separability of an arbitration agreement.
<i>Tokyo-chi-han</i> S28.4.10.	1953	<u>Kamin-shû</u> . Vol. 4, N0.1-6, 1953: p. 502.	Stay of court proceedings. Courts stayed the proceedings on the basis of an arbitration agreement.
<i>Tokyo-chi-han</i> S33.1.25.	1958	<u>Ka-min-shû</u> . Vol. 9: p.111	Appointment of arbitrators by a court.
<i>Osaka-chi-han</i> S34.5.11.	1959	<u>Kamin-shû</u> . Vol. 10, No. 5-8: 1960: p.983.	Enforcement of arbitral awards. Rules of enforcement of domestic awards shall be applied to enforcement of foreign awards.
<i>Tokyo-chi-han</i> S34,8,20.	1959	<u>Kamin-shû</u> . Vol. 10, No. 8, 1959: p.1711.	Enforcement of arbitral awards. A foreign award was enforced based on the 1928 Geneva Convention.
<i>Sai-han</i> S34.12.22.	1959	<u>Han-ji</u> . No. 211, p.13.	Conflict of laws. Capacity of a person to enter into procedural acts was examined by the law of his or her domicile.

## Cases

<i>Kôbe-chi-han</i> S34.9.2.	1959	<u>Ka-min-shû</u> . Vol. 10, No. 9: p. 1849.	Conflict of laws. Capacity of a juridical person was examined by the law of the country where the contract was concluded in the case of apparent authority.
<i>Sai-han</i> S39.3.25.	1964	<u>Mîn-shû</u> . Vol. 18, No. 3: p. 486.	Jurisdiction of court. Theory of balance of jurisdiction on international procedure was discussed.
<i>Tokyo-chi-han</i> S45.7.15.	1970	<u>Han-ji</u> . No. 614: p. 73.	Stay of court proceedings. The stay was recognised after submission of defence because it was difficult to conclude that the party had the intention to abandon the right of stay.
<i>Tokyo-chi-han</i> S47.5.2.	1972	<u>Han-ji</u> . No. 667: p. 47.	Jurisdiction of court Recognition of jurisdiction on the basis of the place of performance of a monetary obligation was denied.
<i>Tokyo-chi-han</i> S48.10.29.	1973	<u>Han-ji</u> . No. 736: p. 65.	Stay of court proceedings. The party could ask the stay until the end of the oral proceedings, unless it was made in order to delay the legal proceedings or against justice.
<i>Osaka-kô-han</i> S49.2.20.	1974	<u>Han-ji</u> . No. 746: p. 42.	Stay of court proceedings. The stay was not recognised because the district court already issued a judgement without the participation of the appellant.
<i>Sai-han (Dai-san- shô-hôtei)</i> S50.7.15.	1975	<u>Mîn-shû</u> . Vol. 29, No. 5-8, 1975: p.1061.	Separability of an arbitration agreement.

## Cases

<i>Tokyo-chi-han</i> S50.5.29.	1975	<u>Han-ji.</u> No. 801: p. 59.	Stay of court proceedings. An agreement of mediation or conciliation should bind the parties in the same way with an arbitration agreement.
<i>Tokyo-chi-han</i> S50.5.15.	1975	<u>Han-ji.</u> No. 799: p. 62.	Stay of court proceedings. The party lost the right to ask the stay after making a pleading in the court litigation.
<i>Tokyo-chi-han</i> S52.4.22.	1977	<u>Han-ji.</u> No. 863: p.100.	Conflict of laws. The court recognised law implied by the parties.
<i>Sai-han</i> S56.10.16.	1981	<u>Min-shû.</u> Vol. 35, No. 7: p.1224.	Jurisdiction of court. Theory of balance of jurisdiction on international procedure based on domestic jurisdiction was discussed.
<i>Sai-han (Dai-san-shô-hôtei)</i> S56.7.2.	1981	<u>Min -shû.</u> Vol. 35, No. 5: p. 881.	Application of foreign law. Appeal based on mistake of application by court was recognised.
<i>Osaka-kô-han</i> S59.5.29.	1984	<u>Han-ta.</u> Vol. 533: p. 166.	Assignment of an arbitration agreement. The arbitration agreement did not bind the endorser of the bill.
<i>Sai-han</i> S61.6.2.	1986	<u>Han-ji.</u> No. 1196: p. 87; <u>Han-ta.</u> No. 604: p. 138.	Jurisdiction of court. Theory of balance of jurisdiction on international procedure was discussed.
<i>Tokyo-chi-han</i> H5.3.25.	1993	<u>Han-ta.</u> Vol. 816: p. 233.	Classification of an arbitration agreement.
<i>Tokyo-kô-han</i> H6.5.30.	1993	<u>Han-ji.</u> Vol. 1499: p. 68.	Classification of an arbitration agreement.

## Cases

<i>Sai-han</i> H9.11.11.	1997	<u>Han-ji</u> . No. 1626: p. 74.	Jurisdiction of court. If there are special conditions (Tokudan no Jijyô), the principle of territorial jurisdiction can be amended.
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(The Year is when the judgement was issued.)

## III. Russia

### III-1. Cases in the FTAC, AC, ICAC

Case	Year	Source	Subject Matter (discussed in this paper)
<i>V O Vostokintorg v. Mr. Bairam Erenchuch.</i>	1941	<u>ICA</u> : No. 21.	Separability of arbitration agreement.
<i>Mr. Hoffman (Zurich) v. V O Mashinoimport.</i>	1954	<u>ICA</u> : No. 44.	Assignment of an arbitration agreement. An independent agreement was required for assignment of an arbitration agreement.
<i>Soyuznefteeksport v. A. Moroni and A. Keller (Italy).</i>	1960	<u>ICA</u> : No. 75-76.	Conflict of laws. Separability of an arbitration agreement.
<i>Papert &amp; Co., of London v. the Moscow People's Bank, London.</i>	1963	<u>ICA</u> : No. 114.	Jurisdiction of the FTAC.
<i>Mayer v. Cogis.</i>	1964	<u>ICA</u> : No. 125	Conflict of laws. The FTAC applied the proper law of an ordinary contract of a foreign country.
<i>V O Traktoroeksport v. Tarapur.</i>	1974	Lebedev, Sergei N. <u>MKA</u> . P. 73.	Conflict of laws. The law applicable to the arbitration agreement was discussed.

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109/1980. <i>Sojuznefteexport v. Juc Oil.</i>	1980	<u>Yearbook Commercial Arbitration.</u> Vol. 18, 1993: p. 92.	Kompetentz-Kompetentz. Separability of an arbitration agreement. Assignment of rights.
51/1985.	1985	<u>VT.</u> Vol. 5, 1986: p. 46.	Jurisdiction of the AC The AC can hear disputes involving joint ventures.
125/1988.	1988	<u>VT.</u> Vol. 1, 1990: p.38.	Jurisdiction of the AC The AC can hear disputes involving joint ventures.
40/1990.	1990	<u>VT.</u> Vol. 2-3, 1995: p. 39.	Kompetentz-Kompetentz. 1972 Moscow Convention did not cover the case of joint ventures.
222/1991.	1991	<u>VT.</u> Vol. 2-3, 1994: pp. 28-29.	Separability of an arbitration agreement.
431 and 439/1991.	1991	<u>VT.</u> Vol. 2-3, 1995: p. 38 at 40.	Time-limit for bringing a claim to the ICAC. Three year time limit was decided in the case involving a join venture.
451/1991.	1991	<u>PMKAS.</u> p. 17 (Case 7).	Separability of an arbitration agreement. The arbitration clause was regarded as valid on the basis of Article 16-1 of the 1993 Law on the ICA.
400/1993.	1993	<u>PMKAS.</u> p. 99 (Case 36).	Separability of an arbitration agreement. .

(The Year is when the claim was brought to the ICAC or FTAC. Abbreviation: ICA-International Commercial Arbitration; Soviet Commercial and Maritime Arbitration; KP-Khozyaistvo i Pravo; VT-Vneshnyaya Torgovlya; AP-Arbitrazhnaya Praktika: Praktika Vneshnetorgovoi Arbitrazhnoi Komissii; PMKAS NPK-Praktika Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda; Nauchno-Prakticheskii Kommentarii; MKA-Mezhdunarodnyi Kommercheskii Arbitrazh; Kompetentsiya

Arbitrov i Sograshenie Storon; PMKAS-Praktika Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda.)

### III-2. Cases in Courts

<i>Ingostrakh v. Aabis Rederi and Sovfrakht.</i> (the Moscow City Court on 6th May 1968)	1968	<u>Yearbook Commercial Arbitration.</u> Vol. 1, 1976: p. 206	Stay of court proceedings.
<i>Izmeritel' v. Omegatekh Elektroniks GmBKh.</i>	1996	<u>Byulleten' Verkhovnogo Suda Rossiiskoi Federatsii.</u> Vol. 3, 1999: p. 12.	Classification of an arbitration agreement.
<i>IMP Group (Cyprus) Ltd. v. Aeroimp.</i>	1997	<u>Yearbook of Commercial Arbitration.</u> Vol. 23, 1998: p. 745.	Classification of an arbitration agreement.

### IV. Cases in Other Countries

Case	Year	Source	Subject Matter (discussed in this paper)
<i>Industrie Tessili Italiana Como v. Dunlop AG.</i> (European Court)	1976	Case 12/76, ECR 1473.	Jurisdiction of courts. Jurisdiction may be decided based on a domestic rule of conflict of laws.

<i>Luise de Cavel v. Jacques de Cavel.</i> (European Court)	1980	Case 120/79, ECR 731.	Jurisdiction of courts. If the subject matter of an ancillary claim itself falls in the scope of the 1968 Brussels Convention, it falls in the Convention whether or not the subject matter of the principal claim falls in the Convention.
<i>Elefanten Schuh GmbH v. Pierre Jacqmain.</i> (European Court)	1981	Case 150/80, ECR 1671.	Jurisdiction of courts. The challenge to a jurisdiction must be made before making statement on substance of the claim.
<i>Effer SpA v. Hans-Joachim Kantner.</i> (European Court)	1982	Case 38/81, ECR 825	Brussels Convention. It depended on situation whether or not, the term 'contract' included the issue of the existence of a contract.
<i>Marc Rich and Co. AG v. Societa Italiana Impianti PA.</i> (European Court)	1991	Case C-190/89, ECR I-3855.	Brussels Convention. It depends on situation whether or not the term 'arbitration' included the issue of the existence of an arbitration agreement.
<i>Mario Reichert and Others v. Dresdner Bank AG.</i> (European Court).	1992	Case C-261/90, ECR I-2149.	Brussels Convention.



Cases

<i>AAOT Foreign Economic Association V O Technostroyexport v. International Development and Trade Services, Inc.</i> (US Court of Appeals for the Second Circuit).	1997	Docket No. 97-9075.	Corruption in the ICAC in Moscow.
<i>Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another.</i> (European Court).	1998	Case-391/95 of the European Court decided on 17th November 1998.	Jurisdiction of courts.

# Part I. Prologue

## Chapter 1. Introduction

### I. Aim of the Paper

#### I-A. Comparison of England, Japan and Russia

The essence of arbitration is the voluntary settlement of disputes. Unlike in the normal courts, it is not necessary for a party to face a totally unfamiliar procedural and substantive law of the country of other parties. The parties can agree arbitrators, the place of arbitration, rules of proceedings and rules applicable to disputes. By reason of this, arbitration is used, especially, in the sphere of international commercial disputes. In this context, the internationalisation of arbitration is being progressed, and several treaties and agreements on international commercial arbitration have been established.<sup>1</sup>

Though there are several treaties and agreements on international arbitration, the validity of issues relating to arbitration still eventually becomes subject to confirmation by the relevant domestic jurisdiction in most cases. For example, the validity of the arbitral award is subject to the law of the country where arbitral proceedings took place in most cases, and also subject to the law of the country where enforcement of arbitral awards is realised.

This paper sets out to compare this system of international commercial arbitration in England, Japan and Russia. There are good reasons to compare these three countries geographically very distant.

As one of the major member countries of the European Union (EU), the amount of annual exports and imports for the UK lies fifth both in 1990 and 1995 in the world (Table C1-1). Within the UK, London, as a centre of world commercial trade, has played a very important role in international commercial arbitration for a

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<sup>1</sup> For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the 1958 New York Convention) was prepared and opened for signature on 10th June 1958 and came into force on 7th June 1959.

The European Convention on International Commercial Arbitration (hereinafter referred to as the 1961 European Convention) was signed on 21st April 1961.

The UNCITRAL Arbitration Rules was adopted by the United Nations Commission on International Trade Law on 28th April 1976. The Model Law on International Commercial Arbitration (hereinafter referred to as the UNCITRAL Model Law) was adopted by the United Nations Commission on International Trade Law on 21st June 1985.

long time. It is timely to examine since new rules were brought in by the Arbitration Act 1996 which came into effect on 1st January 1997.

Table C1-1 Total Imports and Exports in the World<sup>2</sup>

1990	Country	Import (million US \$)	Export (million US \$)
1	USA	516,987	393,592
2	Germany	356,842	422,041
3	<b>Japan</b>	235,423	287,648
4	France	233,207	210,169
5	<b>UK</b>	224,550	185,326
10	<b>USSR</b>	120,651	104,177

1995	Country	Import (million US \$)	Export (million US \$)
1	USA	771,272	584,743
2	Germany	448,219	511,874
3	<b>Japan</b>	335,988	443,265
4	France	275,550	286,817
5	<b>UK</b>	265,320	242,038
17	<b>Russia</b>	46,680	78,290

Japan was a virtually closed country for more than 200 years until the latter half of the 19th century.<sup>3</sup> That situation has now changed drastically. The amount of annual exports and imports was in third place in the world in 1990 and again in 1995 (Table C1-1). In spite of its vigorous economic activity throughout the world, the system of international commercial arbitration is not well developed in Japan. Only recently, did preparation for amendment based on the UNCITRAL Model Law begin on a quasi-official level.<sup>4</sup>

As regards Russia, in the days of the USSR, the amount of the total imports and exports placed the country tenth in the world (Table C1-1). As the leader of the

<sup>2</sup> United Nations. "Total Imports and Exports by Regions and Countries and Areas" 1995 International Trade Statistics Yearbook Vol. II. New York: United Nations, 1995: pp. S2-18.

These are the most recent UN statistics available.

<sup>3</sup> Japan closed the country in 1639 because of the riot inspired by Christianity and opened the country under the pressure of the great powers in 1854. In the period of the isolation policy, however, a very small amount of trade with Holland and China was permitted only in small port in Nagasaki.

<sup>4</sup> Chūsai kenkyū-kai (the Committee of Arbitration) was formed by Japanese experts on arbitration. The Committee prepared the Draft Text of the Law of Arbitration in 1989. Though it is a private plan, it may considerably affect the process of official preparation for new law of arbitration.

socialist block, the USSR played a central role in international commercial arbitration especially among the member countries of the Council for Mutual Economic Assistance (CMEA),<sup>5</sup> which had internationalised rules on arbitration. Though the amount of imports and exports of the USSR's main successor, Russia, was 17th in the world for 1995, Russia has great economic potential, once the problems of transition are resolved. A fair and swift system of settlement of international commercial disputes is a prerequisite for attracting international investments. The Law on International Commercial Arbitration (*Закон РФ о международном коммерческом арбитраже*, hereinafter referred to as the 1993 Law on the ICA) based on the UNCITRAL Model Law was established on 7th July 1993.<sup>6</sup> Since related materials are still few; and there is little research in this field, a study of international commercial arbitration in Russia may be useful.

There are pragmatic reasons to compare the system of international commercial arbitration in the three countries. First, as mentioned above, these countries are leading trading countries in the world. As regards the amount of imports and exports in these three countries, recently Japan and England are within top five and Russia is 17th. As major trading nations, these are often chosen as convenient places for arbitration. Equally when another neutral country is chosen as the place of arbitration, it frequently occurs that one of the parties is from these countries. Therefore a comparison of systems of arbitration in these three countries is important for all those engaged in international trade.

Indeed, London has long been a centre of international commercial arbitration. Russia, as the centre of USSR, also has played a leading role in commercial arbitration in the socialist bloc. It is perhaps disappointing for the Japanese that Tokyo is not the centre of international commercial arbitration even in Asia. The numbers of international commercial arbitration cases, for example, in the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) exceed those heard by the Japan Commercial Arbitration Association (JCAA) (see, Table C1-2).

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<sup>5</sup> The CMEA (or COMECON) was founded by the USSR, Bulgaria, Hungary, Poland, Romania and Czechoslovakia in Moscow in January 1949. According to the Communiqué of the Creation of the CMEA on 25th January 1949, the purpose of the establishment of the CMEA was to develop economic relations among the member countries in order to withstand the Marshal Plan.

Albania joined on 21st February 1949 and the German Democratic Republic on 29th September 1950. Later, Mongolia joined in June 1962, Cuba in July 1972, and Vietnam in June 1978. Yugoslavia, which once rejected a proposal to join the CMEA in December 1961, agreed to participate in certain activities in September 1964.

<sup>6</sup> *Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF*. No. 32, 1993: Item 1240.

The Japanese rules on arbitration have not changed significantly since being heavily copied from the German Civil Procedure Code in 1890, while, for example, Hong Kong introduced the UNCITRAL Model Law on 6th April 1990.<sup>7</sup> Taiwan enacted the new Taiwanese Arbitration Act 1998 in order to promote Taiwan as the Pacific Financial Centre of the Pacific Rim as a substitute for Hong Kong.<sup>8</sup> According to Sigvard Jarvins' survey in 1992, the frequently selected countries for the ICC arbitration are France, Switzerland, USA, and UK. The number of selection of other part of the world, particularly, the South Asia and Far East Asia such as Hong Kong, India, Indonesia, Nepal, the Philippines, Sri Lanka and Taiwan have increased.<sup>9</sup> Japan, in spite of its huge amount of trade dealing, was clearly excluded.

Table C1-2 Number of Cases in Permanent Arbitral Institutions in Asia and the LCIA and ICC<sup>10</sup>

	1994	1995	1996	1997	1998
JCAA	4	8	8	13	15
HKIAC	150	184	197	218	240
SIAC	34	51	51	58	89
LCIA	39	49	37	52	70
ICC	384	427	433	452	466

Underdevelopment of the system of arbitration in Japan was even pointed out by the USA in the Structural Impediments Initiative between Japan and USA in 1992, which was established for removing structural impediments to trade.<sup>11</sup>

Under such circumstances, in order to develop the system of international commercial arbitration, it is useful and necessary to compare Japan, which has relatively little experience of international commercial arbitration, with England and

<sup>7</sup> Kaplan, Neil. "The Model Law in Hong Kong-Ten Years On." Arbitration International. Vol. 8, No. 3, 1992: p. 223.

<sup>8</sup> Yu, Hong-lin. "The Taiwanese Arbitration Act 1998." Journal of International Commercial Arbitration. Vol. 15, No. 4, 1998: p. 107 at 107-108.

The Arbitration Act 1998 came into force on 24th December 1998.

<sup>9</sup> Jarvin, Sigvard. "The ICC Arbitration Process Part V: The Place of Arbitration." The ICC International Court of Arbitration Bulletin. Vol. 41, No. 2, 1993: p. 7 at 9.

<sup>10</sup> These information was obtained by courtesy of Mr. T. Nakamura in the JCAA, Secretary General C. To in the HKIAC, Administration Manager, V. Khor, in the SIAC, Casework Assistant, G. Stone, in the LCIA, and General Counsel, S. Bonnefoy, in the ICC.

<sup>11</sup> "Nichibei-kôzô-mondai-kyôgi Follow-up: Dai-ni-kai Nenji-hôkoku." JCA Journal: Kokusai-shôji-chûsai-sisutemu kôdo-ka kenkyû-kai 1992 hôkoku-sho. Tokyo: JCAA, 1993: P. 91; see also, Mikazuki, Akira. "Funsô-shori-seido-ni-okeru chûsai-no ichi." Gendai-chûsai-hô-no ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Yûhikaku, 1998: p. 3 at 10.

Russia which have much more substantial experience even allowing for major political and economic differences.

Secondly, each country has its own unique background on arbitration. England is in the European culture, Japan in the Asian, and Russia, in a sense, in the most unique culture of the mixture of capitalist and socialist and also of European and Asian. Furthermore, the three systems compared represent different legal traditions, the Anglo-American legal family, the Far Eastern legal family, and the emerging troubled category of Post-socialist family. Perhaps, because of formidable linguistic difficulties, there has so far been no comparative study of these three countries as regards the system of international commercial arbitration.

## I-B. Harmonisation of Law on Arbitration

### I-B-1. Unification of Law on Arbitration

This paper puts forward models for the harmonisation of the law on international commercial arbitration. The starting point is that it should be easier for individuals and organisations engaging in international commercial dealings to solve disputes arising from their activities. Harmonisation rather than unification is the focus. The UNCITRAL Arbitration Law and the UNCITRAL Model Law were established through comparative study of law on arbitration. However, by no means every nation has felt obliged to adopt it. For example, although Russia introduced the UNCITRAL Model Law as the 1993 Law on the International Commercial Arbitration, England did not.

In England, the Secretary of State for Trade and Industry for the UK appointed the Departmental Advisory Committee on International Commercial Arbitration Law under the Chairmanship of Lord Mustill. In June 1989, the Committee concluded that the English law of arbitration was so self evidently superior that it should be maintained in its present form at all costs.<sup>12</sup> Eventually, the Arbitration Act 1996 was enacted based on the “superior” English law of arbitration, while considering the UNCITRAL Model Law. On the other hand, the Scottish Advisory Committee under the chairmanship of Professor J. Murray QC concluded that the UNCITRAL Model Law should be implemented in Scotland. In accordance with this, Scotland adopted the UNCITRAL Model Law through Section 66 and Schedule 7 of the Law Reform (Scotland) Act 1990.

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<sup>12</sup> Mustill, Michael J. "A New Arbitration Act for the United Kingdom?: The Response of the Departmental Advisory Committee to the UNCITRAL Model Law." Arbitration International. Vol. 6, No. 1, 1990: p. 3 at 10.

In Japan, the Committee of Arbitration formed by Japanese experts on arbitration did not simply adopt the UNCITRAL Model Law. It prepared the Draft Text of the Law of Arbitration in 1989, while considering the UNCITRAL Model Law. Thus, one should not be overconfident as to the UNCITRAL Model Law unifying the law of arbitration. Even as between England, Japan and Russia, attitudes towards the UNCITRAL Model Law differ. There is still considerable scope for harmonisation.

Other means of alternative disputes resolution may be developed. However, a system like arbitration, whose decisions bind the parties, may be the most pragmatic way of settling disputes in the sphere of international commercial activities: in international commercial disputes involving parties who may lack a common cultural background, an element of binding force is necessary.<sup>13</sup>

## I-B-2. Delocalisation Theory

As regards harmonisation of arbitral proceedings, the delocalisation theory may overcome any difference in the law on arbitration. It insists that international commercial arbitration should not be subject to local procedural law.

The delocalisation theory has been developed from the doctrine of state immunity discussed in the case of the *Aramco Arbitration* held in Geneva in 1955.<sup>14</sup> In the case, the Kingdom of Saudi Arabia granted an oil concession agreement to the Arabian American Oil Company (Aramco) in 1933. Notwithstanding this, Saudi Arabia concluded an agreement to give a 30 years right of priority for the transport of Saudi Arabian oil with the late Aristotle Onassis and his company, Saudi Arabian Maritime Tankers Ltd., in 1954. In response in arbitration in Geneva, Aramco claimed that it had the exclusive right to transport oil in its concession area. The case was decided in favour of Aramco.

In this case, since one of the parties was a state, with jurisdictional immunity according to international law, the arbitral tribunal decided that sovereign state could not be subject to the procedural law of another state. Only international law could be applicable. As a result, the arbitral tribunal must lead to a purely

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<sup>13</sup> Integration of arbitration and mediation must be also an effective way of dispute settlement (Mikazuki, Akira. "Kokusai-chūsai." *Shin-jitsumu-minji-soshō-kōza 7: Kokusai-minji-soshō Kaisha-soshō*. Tokyo: Nihon hyōron-sha, 1985: p. 219 at 246). Such an example was the *IBM-Fujitsu* case (Bühning-Uhle, Christian. *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*. London: Kluwer Law International, 1996: p. 381; Mnookin, Robert H. "Creating Value through Process Design." *Journal of International Arbitration*. Vol. 11, No. 1, 1994: p. 125).

<sup>14</sup> "*Saudi Arabia v. Arabian American Oil Company*." *International Law Report*. Vol. 27, 1963: p. 117.

declaratory award.<sup>15</sup> The only possible realisation of the award was by voluntary submission, performance under international law secured by good faith or international public policy. Considerations of sovereign immunity lead to the internationalisation theory, under which international authority is invoked to realise awards.

The delocalisation theory was developed, based on the idea of applying only international law on procedure, to take account of the necessity of securing enforcement. Under this theory, the country where enforcement of the award is sought should only refuse enforcement on the basis of international public policy. The seat of arbitration is often chosen simply for geographical convenience or political neutrality.<sup>16</sup> In such cases, arbitration should not be subject to the law of the country where it was or is to be held.

The delocalisation theory does not totally preclude the involvement of a national jurisdiction. Paulsson has stated: "The point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin."<sup>17</sup> At least one national court is empowered to enforce. It thus differs from internationalisation in that the international legal order is not firmly secured by any international authority especially in the sphere of disputes among private persons.<sup>18</sup>

Under the delocalisation theory, the comparative study of the law of international arbitration may arguably become less significant. However, in practice, effective international conventions and model laws such as the 1958 New York Convention and the UNCITRAL Model law follow the seat theory, under which arbitral proceedings must be examined by the law of the country where arbitration was or is to be held. Moreover, in order to realise interim measures, assistance from the law of the country where arbitration is held is necessary. It may still be difficult to achieve delocalisation in the pure sense. Comparative study of the law of arbitration in different jurisdictions is still desirable in the interests of harmonisation. The legal systems and cultural backgrounds in England, Japan and Russia in particular are so diverse that comparative study has considerable potential to make a contribution towards harmonisation.

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<sup>15</sup> Id. at 156.

<sup>16</sup> Redfern, Alan and Hunter, Martin. Law and Practice of International Commercial Arbitration. London: Sweet & Maxwell, 1991: pp. 87-88.

<sup>17</sup> Paulsson, Jan. "Delocalisation of International Commercial Arbitration: When and Why It Matters." International and Comparative Law Quarterly. Vol. 32, 1983: p. 53 at 57.

<sup>18</sup> See, Mayer, Pierre. "The Trend towards Delocalisation in the Last 100 Years." Internationalisation of International Arbitration: The LCIA Centenary Conference. London: Graham & Trotman/Martinus Nijhoff, 1995: p. 37 at 37-8.



### I-B-3. Sphere for Harmonisation

Despite the progress towards unification of the law on arbitration, with for example the 1958 New York Convention and the UNCITRAL Model Law, most issues of international private law are excluded from these conventions. It was advised that the provisions of the 1958 New York Conventions should not exert too much influence over international private law in each jurisdiction.<sup>19</sup> Similarly, Article 16 of the UNCITRAL Model Law does not contain a choice of law provision to examine the validity of an arbitration agreement. Instead, the Secretariat simply suggests that the arbitral tribunal should apply the same choice of laws rules in Article 34 which provides rules to set aside arbitral awards.<sup>20</sup> Choice of law rules on the law applicable to substantive disputes are provided by Article 28.

Despite the level of involvement of Japanese companies in international markets, there are few international private law cases relating to arbitration in Japan. Similarly, after the breakdown of the USSR and CMEA, there are also few precedents in Russia in this area. Russia is facing the new issue of internationalisation of arbitration not only within the CMEA, but also in the wider international context. Thus, the English experience and development of international private law relating to arbitration may be instructive.

In so far as arbitration is held in a national jurisdiction, arbitration cannot be free from some of the mandatory procedural rules applicable to that jurisdiction. The comparative study of the law on arbitration is of considerable practical significance in that it throws important light on this process, and thus must take into account both aspects: international private law and law on arbitration as defined above.<sup>21</sup>

The issues concerning international jurisdiction are given special focus. Despite progress towards unification with the 1958 New York Convention and the UNCITRAL Model Law, there are still few rules in this area. The 1958 New York Convention only provides unified rules on enforcement of foreign arbitral awards, but not on international jurisdiction, except one article on staying court litigation on the grounds of the existence of an arbitration agreement. The court which is

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<sup>19</sup> "United Nations Conference on International Commercial Arbitration Summary Record of the 13th Meeting." UN Docu. E/CONF.26/SR.13 12 September 1958: p. 7.

<sup>20</sup> Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994: pp. 480-481.

<sup>21</sup> Mikazuki, Akira. "Kokusai-chûsai." Shin Jitsumu-minji-soshô-kôza: Kokusai-minji-sôshô, Kaisha-sôshô. Tokyo: Nihon-hyôron-sha, 1985: p. 219 at 250-260.

requested to grant a stay can have jurisdiction under the 1958 New York Convention. However, this provision does not impose exclusive jurisdiction, and may therefore result in competition of jurisdiction.

The second part of this thesis, "Jurisdiction Relating to Arbitration," discusses methods of avoiding such competition of international jurisdiction. It also focuses upon the seat of arbitration and considers the seat theory. This theory brings a new framework of rules on jurisdiction which have hitherto not been clearly recognised.

The third part "Classification of an Arbitration Agreement," will look at the classification of arbitration agreements and its impact upon international private law and the law on arbitration. Although the issue of the classification of an arbitration agreement is not new, little of the analysis to date has gone much beyond the problem of substantive or procedural classification. The classification of an arbitration agreement affects, directly or indirectly, the international private law rules such as the law applicable to an arbitration agreement and the law applicable to the capacity of parties to enter into an arbitration agreement, as well as the law on arbitration such as the principle of separability of an arbitration agreement, assignment of an arbitration agreement, the principle of Kompetenz-Kompetenz, and the stay of court proceedings on the basis of the existence of an arbitration agreement. This part of the thesis uses the comparative method to offer a new approach to the classification of an arbitration agreement and its effects.

Thus, this thesis puts forward reasoned proposals for the harmonisation of systems of international commercial arbitration in those areas where commercial expediency has identified the greatest need.

## II. Approach of the Study

### II-A. Pragmatic Approach

The pragmatic approach, adopted by most Western scholars or lawyers, considers that arbitration is the common method of settling international disputes. Whether an arbitration agreement is inserted in a contract after careful examination or added incidentally in a standard form contract, the existence of the arbitration agreement is regarded as an absolute precondition for arbitration.

As Lambert stated to the Congress held at the inception of modern comparative law: "Comparative law must resolve the accidental and divisible differences in the law of people at similar stage of cultural and economic

development."<sup>22</sup> A pragmatic approach is indispensable when applying the comparative method to Western countries, with relatively similar culture and institutions, and non-western countries. And indeed, when this approach is used, the unification of the law on arbitration can appear to be to an extent the result of a natural evolution.

The development of rules of arbitral institutions, for example, the Rules of Arbitration of the International Chamber of Commerce (ICC),<sup>23</sup> and the conclusion of a treaty on that basis, may be the easiest way to achieve unification of law on arbitration. Accordingly, the pragmatic approach may prefer the internationalisation of arbitration law, or the delocalisation theory, which insists that international commercial arbitration should be subject not to legal control of countries but international law.<sup>24</sup>

To be sure, most of the procedural issues are covered by the rules of permanent arbitral institutions, and consequently those who take the pragmatic approach seem to prefer these rules of arbitral institutions to the law on arbitration which is obviously obsolete in some countries.<sup>25</sup> Some scholars and practitioners fall into the trap of confusing rules on arbitral institutions with the law on arbitration in a given country. However, the value of the rules of permanent arbitral institutions should not be overestimated as they do not solve all problems relating to arbitration.

First of all, unless the parties agree, these rules cannot be applied. The parties must then look to related legal rules to resolve the disagreement. Secondly,

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<sup>22</sup> Lambert, Édouard. "Conception générale et définition de la science du droit comparé," *Procès-verbaux des séances et documents, Congrès international de droit comparé I* (1905) 26, printed in Zweigert/Puttfarcken (eds.), *Rechtsvergleichung*, 1978: p. 30. Discussed in: Zweigert, Konrad and Kötz, Hein. *Introduction to Comparative Law*, 3rd ed. Oxford: Clarendon Press, 1998: p. 3.

<sup>23</sup> The latest rules came in to effect on 1 January 1998.

<sup>24</sup> A realisation of the delocalisation theory was the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 1965 Washington Convention) formulated by the International Bank for Reconstruction and Development (the World Bank) on 18th March 1965. It came into force on October 14, 1966.

The UK made the deposit of ratification on 19th December 1966 and the Convention came into force on 18th January 1967, Japan made deposit on 17th August 1967 and it came into force on 16th September 1967. Neither the USSR nor Russia ratified the 1965 Washington Convention.

It established the International Centre for Settlement of Investment Disputes (ICSID). The ICSID procedure is available for the disputes between a contracting state and a national of another contracting state. The ICSID procedure is available on two conditions: the dispute must be a legal dispute arising directly out of an investment between a contracting state and a national of another contracting state; and the parties to the dispute consent in writing to submit to the ICSID (Article 25-1).

<sup>25</sup> For example, Law on Arbitration in Japan was established in 1890, and is basically kept unchanged since then.

the rules of permanent arbitral institutions are invalid if they are contrary to mandatory legal provisions in the country where arbitration is held. But although the rules of permanent arbitral institutions may be in harmony with the law of the country where these institutions are located, they may not necessarily be in harmony with the law of other jurisdictions.

## II-B. Sceptical Approach

The second possible approach is one of scepticism, which may be adopted by people from countries where arbitration is not a familiar method of settling disputes. As is well-known, conciliation or mediation rather than arbitration is the popular method of settling disputes in East Asian countries such as China, Japan and South Korea.<sup>26</sup> There, arbitration may be regarded as one of a choice of possible methods for settling disputes. Even if there is a clearly written and signed arbitration agreement, the parties may consider other possibilities of settling disputes such as conciliation.

Obviously, those who take the sceptical approach are also bound by the arbitration agreement if proper proceedings are taken by court, but the fundamental distinction from the pragmatic approach remains that the sceptical approach does not consider arbitration to be the unique method of dispute resolution.

Those taking the sceptical approach are likely to be unfamiliar with rules of permanent arbitral institutions. Then, positively or unavoidably, the law on arbitration functions as the ultimate means to set arbitration. Those who are sceptical about arbitration may feel more secure with the law of arbitration rather than the rules of specific local arbitral institutions and thus it in fact becomes easier to secure enforcement of awards issued in harmony with the law of the country where arbitration took place. Article V-1-(d) of the 1958 New York Convention provides that recognition and enforcement of the award may be refused if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.

Whether the pragmatic or the sceptical approach is taken, it is clear that the law on arbitration cannot be ignored in the process of arbitration. This thesis attempts to strike a balance between the merits of the two different approaches, in comparing the law on arbitration and international private law in England, Japan

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<sup>26</sup> Trappe, Johannes. "Conciliation in the Far East." Arbitration International. Vol. 5, No. 2, 1989: p. 173 at Chapter II.

and Russia.

## II-C. Law on Arbitration and Rules of Arbitral Institutions

### II-C-1. Relationship between Issues Relating to Arbitration and Law in England and Japan

A neutral approach is taken to **international private law and law on arbitration**, in England, Japan and Russia. Confusion between the rules on arbitral institutions in a particular jurisdiction and the law on arbitration is particularly prevalent among those who were involved in arbitration in the USSR. The means of confirming the validity of issues relating to arbitration differed as between England or Japan and the USSR. The crux of the difference lay in the status of permanent arbitral institutions.

With the pragmatic approach in mind, this paper also takes into account existing rules of major permanent arbitral institutions in these three countries such as the London Court of International Arbitration (LCIA), the Japan Commercial Arbitration Association (JCAA), and the International Commercial Arbitration Court (ICAC). The LCIA was inaugurated as the London Chamber of Arbitration in 1892. It consists of the Corporations of the City of London, the London Chamber of Commerce and Industry and the Chartered Institute of Arbitrators.<sup>27</sup> The JCAA was founded in 1950. It is comprised of the Japan Chamber of Commerce and Industry, the Japan Federation of Economic Organisation, the Federation of Banker's Association of Japan, and other four economic organisations.<sup>28</sup> The ICAC is attached to Russian Federation Chamber of Commerce and Industry (RF CCI). The position of the ICAC, like that of its predecessors, the Foreign Trade Arbitration Commission (FTAC) and Arbitration Court (AC) is fundamentally different from that of the LCIA and the JCAA.

The LCIA and JCAA both have long traditions as independent permanent arbitral tribunals. On the other hand, the USSR CCI, to which the FTAC and AC, the predecessors of the ICAC, were attached, was a public body with more or less exclusive jurisdiction over international commercial disputes under the USSR regime. Only recently has the ICAC changed to become an independent institution equivalent to the LCIA or JCAA.

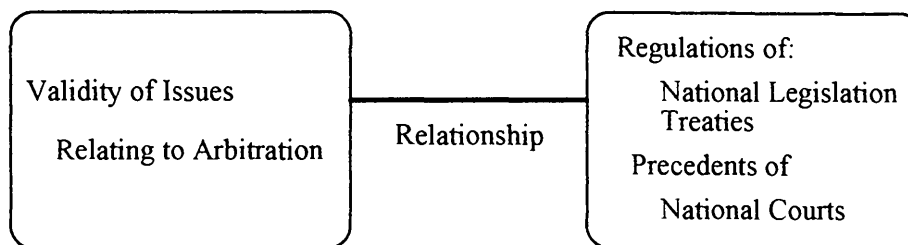
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<sup>27</sup> The LCIA ed. An Introduction to the LCIA. London: Barnard & Westwood Ltd., 1995: p. 5.

<sup>28</sup> Ôkuma, Kazutake. Kokusai-shôji-chûsai no Riron to Jitsumu. Tokyo: Chûô-keizai-sha, 1995: p. 28.

Special attention will be paid to the ways that confirmation of validity of issues relating to arbitration differs as between England or Japan and Russia. In the case of England and Japan, the relationship between law, treaties or precedents of courts and issues relating to arbitration such as in the LCIA or JCAA must be examined (Table C1-3). Mustill and Boyd state: "In the case of disputes, the following relationship must be examined: between the process of arbitration and the courts which will decide whether the procedural rights of the parties to an arbitration have been infringed, and which will administer remedies if an infringement is found."<sup>29</sup>

Table C1-3 Relationship between Arbitration and Law in England and Japan



While, in England, precedent is binding, there is no equivalent rule in Japan, and consequently, precedent does not bind the courts.<sup>30</sup> However, precedent can, to some extent, influence the court's decision making. First, Article 192 of the Rules of the 1996 CPC (Article 48 of the Rules of the 1890 CPC) implies that deviation from precedents of higher courts can be a basis for appeal.<sup>31</sup> Secondly, court judgements are scrutinised by scholars and lawyers, and commentaries are published in legal periodicals in a way which contributes to the stability of legal interpretation.

In terms of international treaties, in England, it is often the national law enacted on the basis of an international treaty that has binding force.<sup>32</sup> On the other hand, in Japan and Russia the pattern is for the international treaty itself to be given binding power. Article 98-2 of the Japanese Constitution provides that international

<sup>29</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 3, footnote 2.

<sup>30</sup> See, e.g. Oda, Hiroshi. Japanese Law. London: Butterworths, 1992: pp. 53-57; Dean, Meryll. Japanese Legal System: Text and Materials. London: Cavendish Publishing Ltd., 1997: pp. 185-188.

<sup>31</sup> Article 192 of the Rules of the 1996 CPC provides that, in the form of appeal, if the appellant claims that the judgement is contrary to a precedent of the Supreme Court (in absence of it, of the Great Court of Judicature (Daishin-in) or higher court), he must clearly indicate the precedent.

<sup>32</sup> Graig, D. W. International Law, 2nd ed. London: Butterworths, 1976: p. 60; McNair, Arnald Duncan. Law of Treaties. Oxford: Clarendon Press, 1938: pp. 7-8; as regards different approaches to international treaties, see, Korkelia, Konstantin. "New Trends Regarding the Relationship between International and National Law (with a Special View towards the States of Eastern Europe)." Review of Central and Eastern Law. Vol. 23, No. 3-4: p. 227 at 228.

treaties as well as the Japanese laws must be faithfully observed. Thus, international treaties are given the same legal effect with Japanese domestic law, without need for implementing legislation. In Russia, Article 15-4 of the 1993 Constitution of the RF provides that the generally recognised principles and norms of international law and the international treaties of the RF shall constitute part of its legal system. If an international treaty of the RF establishes other rules than those stipulated by the law, the rules of international treaty shall apply. (Under the Soviet regime, in contrast, international treaties were binding only if they were transformed into a separate statute or administrative regulation. The reform began under the perestroika with the recognition that the country could not be fully integrated into the world community if it did not accept internationally common norms.<sup>33</sup> In this context, the Russian Federated Constitutional Court was established.)<sup>34</sup>

## II-C-2. Relationship between Issues Relating to Arbitration and Law in Russia

### II-C-2-a. In the Period of the FTAC (1932-1987)

Under the USSR regime, the USSR CCI, to which the FTAC or AC was attached, was a social organisation with more or less exclusive jurisdiction over international commercial disputes. This situation has now changed, but the status of permanent arbitral institutions in Russia merits preliminary discussion.

The Foreign Trade Arbitration Commission (FTAC) was established on 17th June 1932 by the Statute of the Central Executive Committee and the Council of People's Commissars of the USSR.<sup>35</sup> The FTAC was comprised of members confirmed by the Presidium of the USSR Chamber of Commerce and Industry (hereinafter referred to as the USSR CCI).<sup>36</sup> The USSR CCI<sup>37</sup> was a social organisation, operating on the basis of a Charter, and consequently, it was a juridical person and had its own assets formed from membership dues and fees earned from its economic functions and services.

Article 1 of the Charter of the USSR CCI in 1967 prescribed that the USSR Ministry of Foreign Trade exercised general supervision over the activities of the

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<sup>33</sup> Danilenko, Gennady M. "The New Russian Constitution and International Law." American Journal of International Law. Vol. 88, 1994: p. 451 at 458.

<sup>34</sup> See, e.g. Reid, Elspeth. "The Russian Federation Constitutional Court: October 1991-October 1993." Coexistence. Vol. 32, 1995: pp. 277-303.

<sup>35</sup> Sobranie Zakonov i Rasporiazhenii SSSR. No. 48, 1932: Item 281.

<sup>36</sup> See, e.g., Article 3 of the Statute on the FTAC adopted by the Presidium of the Supreme Soviet of the USSR on 16th April 1975 (Vedomosti Verkhovnogo Soveta SSSR. No. 17, Item 269, 1975).

<sup>37</sup> It was called, prior to 1975, the All-Union CCI, after that, the USSR CCI.

USSR CCI.<sup>38</sup> After the Charter of 1974, this provision was omitted.<sup>39</sup> In spite of that, it seems to be difficult to regard the USSR CCI as completely independent from the then omnipotent Communist Party of the Soviet Union (CPSU). The members of the USSR CCI were state organisations which were responsible to and received order from the USSR Ministry of Foreign Trade<sup>40</sup> which was controlled by the CPSU. In the FTAC, the party's choice of arbitrators was limited to a closed number in the list established by the USSR CCI. The arbitrators in the list were, all from the USSR, selected from various fields and had specialised knowledge and experience.

Under the top-down structure starting from the CPSU, the USSR Ministry of Foreign Trade, the USSR CCI, the FTAC and its Soviet arbitrators, there was, to some extent, co-ordination in practice and the legal understanding of issues relating to arbitration held in the FTAC. Although no legislation so provided, the FTAC had in effect exclusive jurisdiction over disputes arising from foreign trade. Therefore, it was inevitable that decisions of the FTAC were influential over cases. For example, in the case of *Sojuznefteexport v. JOC Oil Ltd.* (1984),<sup>41</sup> the FTAC quoted the 1974 decision in *V O Traktoroeksport v. Tarapur*.<sup>42</sup>

## II-C-2-b. In the Period of the AC (1987-1993)

The FTAC was renamed as the Arbitration Court by Article 1 of the Statute on the Arbitration Court attached to the USSR CCI adopted on 14th December 1987<sup>43</sup> (hereinafter referred to as the 1987 Statute on the AC). In accordance with the new 1987 Statute, new Rules of the Arbitration Court attached to the USSR CCI were established by the Presidium of the USSR CCI on 11th March 1988 (hereinafter referred to as the 1988 Rules on the AC). The status and independence of the FTAC have subtly changed after the 1987 Statute on the AC and the 1988 Rule on the AC were established during the period of Gorbachev-led reforms. It

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<sup>38</sup> Hobér, Kaj. "Arbitration in Moscow." *Arbitration International*. Vol. 3, No. 2, 1987: p. 119 at 123 footnote 12.

<sup>39</sup> Viechtbauer, Volker. "Arbitration in Russia." *Stanford Journal of International Law*. Vol. 29, 1993: p. 355 at 373; Butler, William E. *Soviet Law*, 2nd ed. London: Butterworths, 1988: p. 387.

<sup>40</sup> By the Decrees on "Measures Relating to the Improvement of the Administration of Foreign Economic Relations" and on "Measures Relating to the Improvement of the Administration of Economic and Scientific-Technical Co-operation with Socialist Countries" on 19th August 1986, the USSR Ministry of Foreign Trade was replaced by the State Foreign Economic Commission of the USSR Council of Ministers regarding to its supervising power over state foreign trade organisations.

<sup>41</sup> *Sojuznefteexport v. JOC Oil Ltd.* *Yearbook: Commercial Arbitration*. Vol. 18, 1993: p. 92.

<sup>42</sup> Lebedev, Sergei N. *Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon*. Moscow: Torgovo-promyshlennaya Palata SSSR, 1988: p. 73.

<sup>43</sup> *Vedomosti Verkhovnogo Soveta SSSR*. No. 50, 1987: Item 806.



seems that Soviet arbitrators, who were still chosen from the list prepared by the USSR CCI, were considerably relieved from the tacit authoritative demand for coordination in practice and legal understanding of issues relating to arbitration held in the AC in this period. Certainly, there had been some compulsory demands such as application of legal norms to settle substantive disputes. However, traditionally, arbitrators in the FTAC seemed to enjoy quite wide discretion. For example, there were different understandings of the classification of an arbitration agreement, which will be mentioned below.

## II-C-2-c. In the Period of the ICAC (1993- )

The USSR CCI, governing body of the Arbitration Court, was officially succeeded by the RSFSR CCI in terms of the Decree of the Supreme Soviet of the RSFSR of 18th November 1991.<sup>44</sup> Eventually, the Arbitration Court was placed under the Russian Federation<sup>45</sup> CCI<sup>46</sup> (hereinafter referred to as the RF CCI) and renamed as the International Commercial Arbitration Court (ICAC) attached to the RF CCI by the 1993 Law on the ICA enacted by the RF Congress on 7th July 1993.<sup>47</sup> The RF CCI established the new Rules on the ICAC on 8th December 1994 (hereinafter referred to as the 1994 Rules on the ICAC).

The Schedule 1 (*приложение 1*) of the 1993 Law on the ICA provides that: "the ICAC is an independent, permanently functioning arbitral institution (*третейский суд*) acting under the 1993 Law on the ICA." It has become possible to select arbitrators beyond the list after the 1994 Rules on the ICAC were established.

In recent times, all rulings and awards issued by the ICAC have usually fallen under the competence of the Moscow City Court,<sup>48</sup> because Section 7 of the 1994 Rules on the ICAC clearly provides that the seat of arbitration shall be the city of Moscow. Decisions of the Moscow City Court can be appealed to the Supreme Court of the RF. Recently, several other arbitration courts have been established in Russia.<sup>49</sup> Therefore, other national courts in other areas in charge of these will deal

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<sup>44</sup> Vedomosti S"ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR. No. 47, 1991: Item 1620.

<sup>45</sup> The RSFSR (Russian Soviet Federated Socialist Republic) was re-named, by removing "Soviet and Socialist Republic," to the Russian Federation (RF) or Russia on 25th December 1991 (Vedomosti S"ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR. No. 2, 1992: Item 62).

<sup>46</sup> Vedomosti C"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF. No. 5, 1993: Item 159.

<sup>47</sup> Id. No. 32, 1993: Item 1240.

<sup>48</sup> Zykin, Ivan S. "The UNCITRAL Model Law on International Commercial Arbitration: the Russian Experience." Hague Yearbook of International Law. 1996: p. 21 at 22.

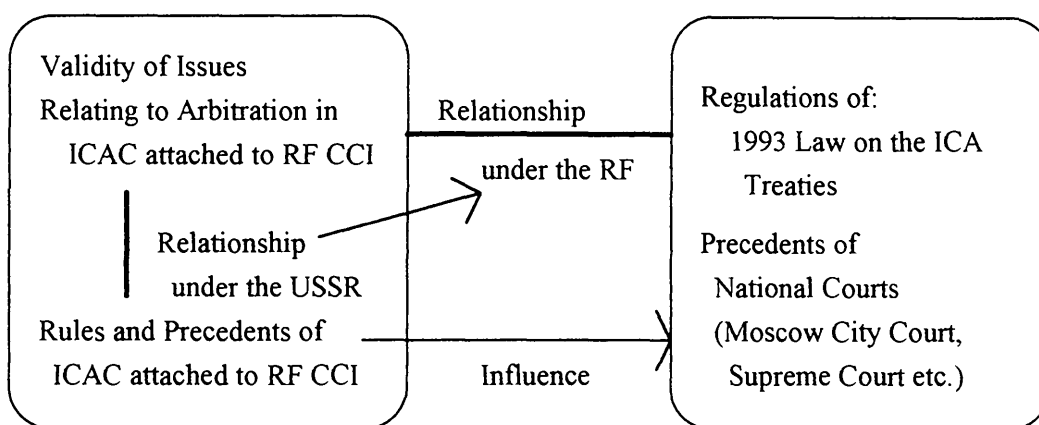
<sup>49</sup> For example, arbitration courts were established at many regional chambers of commerce and industry, at the Association of Russian Banks, at the Union of Lawyers, at the Moscow Interbank

with arbitration soon or later.

As regards precedents, they are traditionally not binding on the courts. However, like in Japan, under the Soviet era, precedents could, to some extent, influence the court's decision making. Judgements of courts were reported in supreme court bulletins and other legal periodicals so as to unify the interpretation of the law. Moreover, judicial organisations, the procurators and judges were obliged to follow the above case reports.<sup>50</sup> This tradition has been succeeded to Russia, and the recent general understanding is that only published judicial decisions can have value as precedents.<sup>51</sup>

It seems that independence of the RF CCI has been also strengthened, because the membership of the CCI is changing. Most of the members have converted into private companies from state organisations due to the privatisation policy. This means reduction of the state influence on the RF CCI.

Table C1-4 Relationship between Arbitration and Law in Russia



Under these conditions, it may be becoming difficult to achieve co-ordination of practice and the interpretation of issues relating to arbitration in the ICAC. As a result, decisions are only recognised as binding precedents once national courts confirm or recognise them.

Although current practice is that binding power of decisions of the ICAC must be confirmed by the Moscow City Court, it may, to some extent, refer to

Currency Exchange, at the International Independent Institute of International Law etc. (Zykin, Ivan S. "Commercial Arbitration in the CIS." International Arbitration Law Resolution Journal. Vol. 1, 1997: p. G-1 at 3.

<sup>50</sup> Butler, William E. Soviet Law, 2nd ed. London: Butterworths, 1988: p. 51.

Procurators had not only the power to monitor activities of judicial organisations but also of administrative (see, e.g. Oda, Hiroshi. "Soviet Procuracy under Gorbachev." Current Legal Problems. Vol. 41, 1988: p. 213).

<sup>51</sup> Butler, William E. Russian Law. Oxford: Oxford University Press, 1999: p. 95.

decisions of the FTAC, AC and ICAC, because, for many years, as mentioned above, the FTAC and AC had in effect exclusive jurisdiction over disputes arising from foreign trade. As a result, other national courts and arbitrazh courts are still not adequately prepared to settle this kind of dispute. In this context, precedents from the FTAC, AC and ICAC are still highly influential in Russia: "At a minimum collections of the international commercial arbitration are invaluable guides to the reasoning of the arbitration when applying the applicable law to disputes before them and may be said to represent a repertoire of arbitral practice in the Russian Federation."<sup>52</sup>

For example, in the cases of No. 431/1991 and 439/1991,<sup>53</sup> the AC decided that the period of limitation for bringing a claim to the AC was three years instead of one year which had been once applied in cases involving state organisations, collective farms, and other co-operative and public organisations (Article 78 of the 1964 Civil Code of the RSFSR). Because of this decision, the 1994 Civil Code has adopted three years as an overall limitation (Article 196).<sup>54</sup>

Consequently, the decisions of the ICAC are less open to challenge, compared with that of permanent arbitration institutions in England and Japan. Their rules and precedents may still exert a strong influence over the decisions of national courts in Russia. Therefore, in this paper, both cases in the ICAC and its predecessor and precedents of national courts are examined.

Thus, the position of the ICAC, especially its predecessors, FTAC or AC, was different from that of the LCIA or JCAA. Although this paper compares law on arbitration in three countries, the rules and decision of the ICAC and its predecessors are mentioned as equivalents with court decisions in the case of Russia.

## III. Terminology

### III-A. "Arbitration"

#### III-A-1. Definition of Arbitration

Because of the diversity of arbitration,<sup>55</sup> it is difficult to define arbitration

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<sup>52</sup> Butler, William E. Russian Law. Oxford: Oxford University Press, 1999: p. 95-96.

<sup>53</sup> Zykin, I. "Iz Praktiki Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda pri TPP RF." Vneshnyaya Torgovlya. Vol. 2-3, 1995: p. 38 at 40.

<sup>54</sup> Id.

<sup>55</sup> For example, the Second Secretariat Note of the UN mentioned about free arbitration such as the *arbitrato irrituale o libero* in Italian law, the Dutch *bindend advies* and the German *Scheidsgutachten*, which are procedures resulting in decisions binding only as contractual provisions

precisely. The exact definition of “arbitration” can not be found in either English, Japanese or Russian legislation. Article 2-(a) of the UNCITRAL Model Law, simply stipulates: “arbitration means any arbitration whether or not administered by a permanent arbitral institution.” In a report prepared by the United Nations (UN), it has been suggested that it was too difficult to provide a comprehensive definition of the term “arbitration,” and the term is rarely defined in either national legislation or international statutes.<sup>56</sup> Indeed, Mustill and Boyd suggest that the courts are very seldom asked to determine whether or not, a procedure was, or was intended to be, an arbitration.<sup>57</sup>

To identify arbitration, its key features must be found. There are three key features. The first is that arbitration must be a voluntary means of settling disputes, based on the will of the parties. The second is that the parties must have the right to exclusively deal with the dispute. And the third is that the parties must obey the decision of the arbitrators.<sup>58</sup>

In each jurisdiction, the concept of arbitration is, to a considerable extent, limited by the definition of an arbitration agreement and rules of arbitral proceedings. Therefore, it may not be necessary to define clearly “arbitration” which has a deliberately vague meaning. On the other hand, if the concept of arbitration is, to some extent, limited, it may not cause great difficulty to define arbitration more precisely. For example, the Draft Text of Law of Arbitration in

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and not as arbitral awards (Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994: pp. 151-152).

The Italian *arbitrato irrituale o libero* is a simple example of free arbitration, in which arbitrators solve disputes beyond the civil procedure code, and the binding power of the decision arises by contract between the parties (Mitsui, Tetsuo. “Chūsai-tetsuzuki to shūhen no sho-seido tono hikaku (1).” JCA Jānaru. No. 11, 1996: p. 2 at 2).

The Dutch *bindend advies* is a mixture of free arbitration and expertise determination, in which the parties can refer to an expert about unsettled matters. The parties are not bound by the expert, however they can also agree to obey the expert before the reference (Mitsui, Tetsuo. “Chūsai-tetsuzuki to shūhen no shoseido tono hikaku (1).” JCA Jānaru. No. 11, 1996: p. 2 at 2).

The German *Scheidsgutachten* is an expert determination, in which the parties refer to an expert which will bind not only the parties but also the court if litigation starts (Kojima, Takeshi and Takakuwa, Akira ed. Chūkai chūsai-hō. Tokyo: Seirin-shoin, 1988: pp. 36-37).

Generally speaking, an expert determination is different from arbitration by the fact that experts confirm not legal relations but the underlying factual basis of the legal relationship. However, this distinction is sometimes vague, for example, the Dutch *bindend advies* can solve disputes about the legal relationship itself if the parties agree. In the final analysis, the strict distinction between expert determination and arbitration depends on the legal rules of each country.

<sup>56</sup> United Nations. Second Secretariat Note Possible Feature of a Model Law: Questions for Discussion. A/CN.9/WG.II/WP.35 (1st December 1981): para. 10.

<sup>57</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd. ed. London: Butterworths, 1989: p.39.

<sup>58</sup> Kojima, Takeshi and Takakuwa, Akira ed. Chūkai chūsai-hō. Tokyo: Seirin-shoin, 1988: p.4.

Japan defines arbitration as the final settlement of particular legal disputes by a decision of the arbitrator based on the parties' agreement (hereinafter referred to as "arbitration agreement") (Section 2).<sup>59</sup>

## III-A-2. Linguistics of Arbitration

### III-A-2-a. Arbitration in English

The term 'arbitration' originated in Latin. The legal system of the Roman Empire was influenced by the ancient Greek system,<sup>60</sup> and the Russians were influenced by the Byzantine Empire. It is possible, therefore, that the terminology may contain common elements as regards arbitration found in Greek, Latin and Russian.

In the time of ancient Greece, there was already a system of arbitration.<sup>61</sup> Aristotle wrote about arbitration in the Atheniensium Republic.<sup>62</sup> The Greek term for the concept of arbitration is 'δῖαιτησία',<sup>63</sup> which comes from 'δῖαιτα.' The Greek term 'δῖαιτα' recently means diet and originally means way of life or manner of life. The Greeks seemed to recognise the concept of arbitration as connected with their way of life. Those who worry about one's way of life may well have been, at that time and even now, neighbours and friends. Plato stated:

"The point in dispute should be made clear by both

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<sup>59</sup> Chûsai-kenkyû-kai ed. Bessatsu NBL No. 25: Chûsai-hô no rippô-ron-teki-kenkyû: chûsai-shian to sono-kaisetsu. Tokyo: Shôji-hômu-kenkyû-kai, 1993: p. 9.

<sup>60</sup> Some peripheral terms of arbitration in the Roman Empire were obviously imported from the ancient Greece. For example, the term, Praetor, who used authority to force the arbitrator to arbitrate in the Roman Empire comes from the Greek 'πραιτωρ.'

<sup>61</sup> The concept of arbitration could be recognised in the scene of the 'Immortal Shield' of the Homer's 'Iliad' written in Greek as early as in the eighth century BC (Homer. Iliad. Robert Fitzgerald trans. London: Everyman's Library, 1992: p. 451, Book Eighteen).

The Iliad was believed to be written in the oldest Greek in the eighth century BC until another Greek writing was found on the Cretan island by Arthur John Evans. Book Eighteen of the Iliad describing the scene of making the Immortal Shield stated: "A crowd, then, in a market place, and there two men at odds over satisfaction owed for a murder done: one claimed that all was paid, and publicly declared it; his opponent turned the reparation down, and both demanded a verdict from an arbiter, as people clamoured in support each, and criers restrained the crowd. The town elders sat in a ring, on chairs of polished stone, the staves of clarion criers in their hands, with which they sprang up, each to speak in turn, and in the middle were two golden measures to be awarded him whose argument would be the most straightforward."

<sup>62</sup> "The Arbitrators take up the case beyond ten drachmas, and, if they cannot bring the parties to an agreement, they give a decision. If their decision satisfies both parties, and they abide by it, the case is at an end; but if either of the parties appeals to the law-courts, the Arbitrators enclose the evidence, the pleadings, and the laws quoted in the case in two urns, those of the plaintiff in the one, and those of the defendant in the other" (Aristotle. "Atheniensium Respublica." Frederic G. Kenyon trans. W. D. Ross ed. The Works of Aristotle Vol. X. Oxford: Clarendon Press, 1921: Chapter 53).

<sup>63</sup> The Greek also uses the term ἀκροαται as the meaning of arbitrator or referee, which originally means hearer.

parties; and time, and deliberation, and repeated examination, greatly tend to clear up doubts. For this reason, he who goes to law with another, should go first of all to his neighbours and friends who know best the questions at issue."<sup>64</sup>

The corresponding Latin word is '*arbitrium*'<sup>65</sup> from which the English word 'arbitration' comes. The term for arbitrator '*arbitri*' is composed of the stems of '*ar*' and '*bit*.' The stem '*ar*' comes from '*ad*,' which means to or toward; and '*bit*' is from '*bito*,' which means to go. The Latin meaning of the *arbitri* is the person who goes to see, that is, eyewitness or spectator. It is possible that there is an etymological connection between the cases *baetere* meaning witness and the Greek διαίτα: a witness can observe the manner of living, and thus there may be a connection between the Greek and Latin terms for arbitration.

### III-A-2-b. Treteiskii Court in Russian

The original Russian term of concept of arbitration is '*третейский суд*' (treteiskii court). The stem '*третей*' comes from '*третий*' which means third; and '*суд*.' means court, therefore '*третейский суд*.' literally means the court of the third person. It is said that this term was first used in an official document of the Prince of Dimitrii Donskoi<sup>66</sup> and Prince of Serpukhov (*серпухов*)<sup>67</sup> Vladimir Khrabrym' in 1362. This document suggested that courts played the role of the third party.<sup>68</sup>

The same term and a similar system were codified in the Sobornoe Ulozhenie (*соборное уложение*) in 1649. Under the reign of Tsar Aleksei Mikhailovich, father of Peter the Great, the Zemskii Sobor or Land Assembly consolidated old Russian laws in the Sobornoe Ulozhenie. It drew from the Pravda Russkaia, Sudebniki, and also Polish-Lithuanian and even Byzantine law.<sup>69</sup>

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<sup>64</sup> Plato. "The Laws." *The Dialogues of Plato Vol. 5*. B. Jowett. trans. Oxford: Clarendon Press, 1875: p. 337.

<sup>65</sup> Liddell, Henry G. and Scott, Robert ed. *A Greek-English Lexicon*. Oxford: Clarendon Press, 1966: p. 396.

<sup>66</sup> The Grand Prince Dimitrii Donskoi defeated the Mongols in the battle of Kulikovo in 1380. This victory significantly strengthened the power of Moscow.

<sup>67</sup> An eastern part of Moscow.

<sup>68</sup> Gessen', I "Treteiskii Sud." *Entsiklopedicheskii Slovar'*, No. 66. St. Petersburg: Izdatel'skoe D'lo, 1901: p. 772.

Obviously, the term "*третейский суд*" was used before the Sobornoe Ulozhenie of 1649 (Ivinoi, L. V. *Sobornoe Ulozhenie 1649 goda: Tekst Kommentarii*. Leningrad: Izdatel'stvo Nauka, 1987: p. 251).

<sup>69</sup> Butler, William E. *Russian Law*. Oxford: Oxford University Press, 1999: p. 22.

Section 15-Article 5 of the Sobornoe Ulozhenie provided that the claimant and the respondent could amicably agree to go to arbitration (treteiskii court), and give it the record of the case, and if the parties did not observe the agreement, the state would impose a fine.<sup>70</sup> This system allowed existing court disputes to be submitted for arbitration.

It seems probable that the treteiskii court as provided for in the Sobornoe Ulozhenie drew upon the Lithuanian Statute of 1588.<sup>71</sup> The term treteiskii court was applied to the system of the friendly court (*полюбовный суд*) under Section 4-Article 85 of the Lithuanian Statute of 1588.<sup>72</sup>

Although there may be some terminological connection between Greek and Latin, there seems to be no common element between Greek or Latin and Russian in terms of the word "arbitration." Though Russian term *третий* comes from the Greek τριτάτος which stands for third, Greek does not use it to mean arbitration.

### III-A-2-c. Chûsai in Japanese

Finally, Japanese uses the term 'chûsai' to mean arbitration. Chûsai is composed of two Chinese characters chû and sai. The Chinese character chû means a person in the position of centre or middle. Sometimes, especially in older literature, another Chinese character chû, which simply means centre, is used. The word sai means to judge. Therefore, chûsai literally means to judge by the person in the position of the middle.

## III-B. "International" and "Commercial"

### III-B-1. International

#### III-B-1-a. General Definition

Next, the terms "international" and "commercial" must be defined. Since the definitions may effect legal validity, these words must ultimately be defined by each domestic legal system, but the terms are analysed in brief here.

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<sup>70</sup> Man'kov, A. G. ed. "Akty Zemskikh soborov Tom 3." Rossiiskoe Zakonodatel'stvo X-XX vekov. Moscow: Yuridicheskaya Literatura, 1985: p. 163.

<sup>71</sup> In practice, most rules of the Sobornoe Ulozhenie were introduced from the Lithuanian Statute of 1588. Some articles were copied word for word (Sigel, Feodor. Lectures on Slavonic Law. London: Henry Frowde, Amen Corner, 1902: p. 44). William E. Butler stated that if the 1649 Ulozhenie did draw significantly upon the Lithuanian Code of 1588, this represented a reception of European law (Butler, William E. Soviet Law, 2nd ed. London: Butterworths, 1988: p. 18).

<sup>72</sup> Shamyakin, P. ed. Statut Velikogo Knyazhestva Litovskogo 1588. Minsk: Belaruskaya Savetskaya Entsiklopedyya, 1989: p. 397.

In this translation, the terms of the friendly court (*полюбовный суд*) and the treteiskii court (*третейский суд*) were used in the same meaning.

Under the UNCITRAL Model Law, there are two approaches to the definition of "international"<sup>73</sup> reflecting the approaches found in domestic laws and in international conventions. The first approach focuses on the nature of the dispute, which involves the interests of international trade. For example, Article 1-1 of the 1998 ICC Rules<sup>74</sup> and Article 1492 of the French Code of Civil Procedure take this approach. The second is related to the parties such as their nationality, habitual place of residence or place of business. The 1961 European Convention takes this approach.

### III-B-1-b. International and Domestic Arbitrations

Though the title of this paper is "the Comparative Study of International Commercial Arbitration," English and Japanese legislation does not strictly distinguish between domestic and international commercial arbitration. There is no clear definition of international commercial arbitration under the Arbitration Act 1996 in England and the Law on Arbitration in Japan. Therefore, it is impossible to distinguish domestic and international commercial arbitration. Most of principles in law on arbitration have been developed in a domestic sphere, and, recently, there are some mutual influences of domestic and international commercial arbitration in England and Japan.

The law on arbitration regulates judicial control of arbitration, that is, relationship between courts and arbitrations, which is a totally domestic procedural matter, suggesting that distinction between the domestic and international commercial arbitrations does not matter. However, if arbitration has international elements, at the stage of recognition and enforcement of arbitral award in other countries, awards made in England and Japan must be classified as foreign arbitral awards under the 1958 New York Convention. Therefore, one of the future possibilities is to harmonise the law on arbitration as regards classification of international commercial arbitration with rules of the 1958 New York Convention

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<sup>73</sup> Article 1-3 provides that an arbitration is "international," if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States;
- (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

<sup>74</sup> Article 1-1 provides that the function of the International Court of Arbitration is to provide for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the ICC.



for interest of enforceability.

The UNCITRAL Model Law accepts, to some extent, this approach, and clearly distinguishes the domestic and international commercial arbitration. Article 1(1) provides that this Law applies to international commercial arbitration. Russia introduced into its laws the UNCITRAL Model Law for international commercial arbitration, and distinguishes domestic and international commercial arbitration.

England, however, had already rejected this approach. The Departmental Advisory Committee to the UNCITRAL Model Law concluded that the English law of arbitration, which does not clearly distinguish domestic and international commercial arbitration, was superior, and it should be maintained.<sup>75</sup> Similarly, in Japan, the Draft Text of the Law of Arbitration in 1989 prepared by the Committee of Arbitration formed by Japanese experts did not introduce the UNCITRAL Model Law. The Draft does not distinguish domestic and international commercial arbitration.<sup>76</sup>

### III-B-1-c. Arbitral Institutions' Rules on International Commercial Arbitration and Law on Arbitration

The term "international commercial arbitration" is commonly used in names of arbitral institutions such as the London Court of International Arbitration (LCIA) and the International Commercial Arbitration Court (ICAC). But the use of the term goes to no more than rules of these arbitral institutions themselves. There is still no international authority to secure arbitral proceedings especially in the sphere of disputes among private persons.<sup>77</sup>

Certainly, recent rules of arbitral institutions are sophisticated, therefore some arbitral procedural problems can be solved within their own regime. This development may also influence the development of national law on arbitration. Those who follow the pragmatic approach, as mentioned above, tend to emphasise this development. However, it is still national law on arbitration which ultimately

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<sup>75</sup> Mustill, Michael J. "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law." Arbitration International. Vol. 6, No. 1, 1990: p. 3 at 10.

<sup>76</sup> Chûsai-kenkyû-kai ed. Bessatsu NBL No. 25: Chûsai-hô no Rippô-ron-teki-kenkyû: Chûsai-shian to Sono-kaisetsu. Tokyo: Shôji-hômu-kenkyû-kai, 1993: p.1.

In Taiwan, the Commercial Arbitration Act Reforming Committee also did not introduced the UNCITRAL Model Law. The Arbitration Act 1998 does not distinguish domestic and international commercial arbitration (Yu, Hong-lin. "The Taiwanese Arbitration Act 1998." Journal of International Commercial Arbitration. Vol. 15, No. 4, 1998: p. 107).

<sup>77</sup> Mayer, Pierre. "The Trend towards Delocalisation in the Last 100 Years." Internationalisation of International Arbitration: The LCIA Centenary Conference. London: Graham & Trotman/ Matinus Nijhoff, 1995: p. 37 at 37-8.

governs arbitral proceedings. One should not confuse the development of international commercial arbitration in the level of rules of arbitral institutions with that of procedural law of an individual jurisdiction.

This paper focuses upon development of law on arbitration which, as mentioned above, does not concern distinction between domestic or international commercial arbitration, unless the law itself distinguishes them as in Russia.

Thus, in this paper, the terms “international commercial arbitration” are used for convenience only, and cases of domestic arbitration are also quoted, because they influence cases of international commercial arbitration and demonstrate the attitudes towards arbitration. At the same time, the classification of foreign arbitral awards under the 1958 New York Convention is also considered.

### III-B-2. Commercial

Regarding the term "commercial," the qualification of commercial is used in some civil law systems, in which a special code of law is applied to commercial cases. Because of this distinction, Article 1 of the 1923 Geneva Protocol and Article 1-3 of the 1958 New York Convention have the so-called commercial reservation, under which each contracting state may limit its obligations to commercial cases. The UK, Japan and Russia declared the "reciprocity reservation," but not the "commercial reservation."

It may be sufficient if the term commercial can distinguish arbitration between private persons from international arbitration between states concerning political matters. In this sense, the explanation of the term “commercial” in the UNCITRAL Model Law is acceptable. The footnote of Article 1-(1) explains the term “commercial”: "The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."<sup>78</sup>

### III-C. "UK" and "RF"

The United Kingdom comprises, for the present, England, Scotland, Wales and Northern Ireland. Scotland and the Northern Ireland have their own legal

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<sup>78</sup> The footnote of Article 1-(1) provides that: "Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

systems different from England and Wales. Furthermore, in theory, Isle of Man and Channel Islands can have their own systems of international commercial arbitration. In this paper, the **English** system of international commercial arbitration will be explained. Other systems of international commercial arbitration in other constituent parts of the UK and the Commonwealth of Nations are also referred to when relevant.

Russia is the general term for the Russian Federation (RF). Though there is a possibility that each administrative division of the RF can have its own system of international commercial arbitration, this paper will focus on that of **the Russian Federation** generally.

Terminology translated from Japanese and Russia into English follows English as far as there are equivalent terms. As a result, the precise definition of a word translated from Japanese and Russian might be slightly different from the original. In the UK, the term “arbiter” is used in Scotland instead of “arbitrator” used in England. Though the term “arbiter” is more loyal to the Latin original, in this paper, the English term “arbitrator” is used.

## IV. Recent System of Arbitration

### IV-A. England

First, recent system of arbitration in England, Japan and Russia will be explained. In England, the Arbitration Clauses (Protocol) Act 1924 gave effect to the Protocol on Arbitration Clauses (1923 Geneva Protocol).<sup>79</sup> It removed the discretionary power of the courts to refuse a stay of proceedings in disputes of parties from among the member countries (Section 1(1)). This section became Section 4(2) of the Arbitration Act 1950 and more recently Section 8(2) of the Arbitration Act 1975 which followed the UK’s accession to the 1958 New York Convention. Because of this convention, an arbitration agreement became internationally recognised as the basis of staying court litigation.

The Arbitration (Foreign Awards) Act 1930 enacted the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (1927 Geneva Convention).<sup>80</sup> Section 2(2) stipulated that any foreign award which would be

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<sup>79</sup> It was adopted by the League of Nations on 24th September 1923, based on the idea of the International Chamber of Commerce (ICC). It was the first multilateral treaty on international commercial arbitration. However, the USA and the USSR were not the member countries. England ratified it on 27th September 1924.

<sup>80</sup> It was adopted under the initiative of the League of Nation on 26th September 1927, because there was no rule on enforcement of arbitral awards in the 1923 Geneva Protocol. The UK ratified it on

enforceable under this Act should be treated as binding for all purposes. Enforcement of arbitral awards was also internationally recognised.

The Arbitration Act 1934 repealed the principle established in *Scott v. Avery*<sup>81</sup>, that is, determination by arbitration was to a condition precedent to a court action in order to strike at the parties who knew that their opponents could not afford to go to arbitration. Section 3(4) stipulated that if the agreement to submit should cease to have effect, the courts may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect. The Arbitration Act 1934 used the term "arbitration agreement" instead of submission to arbitration, but this did not in practice signify substantial changes.

The Arbitration Act 1975 gave effect to the 1958 New York Convention.<sup>82</sup> The Convention makes it obligatory that the contracting state recognises foreign arbitral awards and enforces them (Article III).<sup>83</sup> The Arbitration Act 1979 abolished the special case<sup>84</sup> where arbitral awards with error of law on the face thereof were capable of being set aside. The supervisory power of the courts was reduced.

Taking account of the adoption of the UNCITRAL Model Law in the UN on 21st June 1985, the Secretary of State for Trade and Industry for the UK appointed the Departmental Advisory Committee on International Commercial Arbitration

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2nd July 1930. The 1927 Geneva Convention was replaced by the 1958 New York Convention. However, it can be still applied among the countries which joined the 1927 Geneva Convention but did not join the 1958 New York Convention such as Albania, Iraq and Brazil as of 1st January 1997.

<sup>81</sup> *Alexander Scott v. George Avery* (1856) 5 HLC 811; 10 ER 1121.

This case confirmed that "parties cannot by contract oust the courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant." Arbitration was recognised as pre-condition for court proceedings. The case of *Scott v. Avery* was a turning point in favour of arbitration in the English legal system.

<sup>82</sup> It was prepared and opened for signature on 10th June 1958 by the UN Conference on International Commercial Arbitration. The Conference met at the Headquarters of the UN in New York from 20th May to 10th June 1958. Article 12-1 of the Convention prescribes that this Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the UN. Similarly, Article 9-2 stipulates that accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the UN. The UK deposited the instrument of accession to the 1958 New York Convention with the Secretary-General of the UN on 24th September 1975.

<sup>83</sup> Article 3 provides that: "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

<sup>84</sup> Section 9(1) of the Arbitration Act 1934 provides that an arbitrator or umpire may, and shall if so directed by the Court, state (a) any question of law arising in the course of the reference; or (b) an award or any part of an award, in the form of a special case for the decision of the Court.

Law under the Chairmanship of Lord Mustill. In June 1989, the Committee concluded that the English law of arbitration was so self evidently superior that it should be maintained in its present form at all costs.<sup>85</sup> At the same time, the Committee recommended that a new statute should be enacted, considering the UNCITRAL Model Law.

Finally, the new Arbitration Bill received Royal Assent on 17th June 1996 and the Arbitration Act 1996 came into effect in England on 1st January 1997.<sup>86</sup> The government claimed that the Arbitration Act 1996 embodied both the best of the UNCITRAL Model law and the distillation of 300 years of British arbitration expertise.<sup>87</sup>

The Arbitration Act 1996 was enacted in line with former legislation relating to arbitration in England and international conventions. It became possible, in theory, to resolve disputes by use of non-legal norms,<sup>88</sup> which was a major shift from the Arbitration Act 1979. However, as a consequence, the parties are in effect excluding any right of appeal to the courts in this regard.<sup>89</sup>

## VI-B. Japan

After the Meiji Restoration of 1868, the new Meiji government actively introduced advanced Western system in various fields. In terms of legal system, the Meiji government first preferred French system. However, there was a gradual shift from French law to Prussian law, because Japanese leaders thought that Prussia had a strongly centralised monarch system which would be suitable to the Japanese Tennô or emperor system.<sup>90</sup>

The Meiji government decided to draft a civil procedure code based on the

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<sup>85</sup> Mustill, Michael J. "A New Arbitration Act for the United Kingdom?: The Response of the Departmental Advisory Committee to the UNCITRAL Model Law." Arbitration International. Vol. 6, No. 1, 1990: p. 3 at 10.

<sup>86</sup> It replaced the Arbitration Acts of 1950, 1975 and 1979.

<sup>87</sup> Holman, Fenwick & Willan. "300 Years of English Arbitration Wisdom: The Arbitration Act 1996." Corporate Briefing. Vol. 10, NO.7, 1996: p.16.

<sup>88</sup> Article 46-(1) provides that the arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

<sup>89</sup> See, General Note of Article 46 of the Arbitration Act 1996.

<sup>90</sup> Oda, Hiroshi. Japanese Law. London: Butterworths, 1992: p. 27.

For example, the Kaiser was free from parliamentary control. It is also said that Japanese leaders looking at Europe were especially impressed by Bismarck, who devoted himself to development of Germany in order to compete with the other great European powers.

Another reason of shift from French to German Civil Code was that at that time the German Civil Code (BGB, Bürgerliche Gesetzbuch) was regarded as the most mature product of civil legislation (Zweigert, Konrad and Kötz, Hein. Introduction to Comparative Law, 3rd ed. Oxford: Clarendon Press, 1998: p. 298).

German model. The government invited a councillor of Preussen called Techow to Japan. Techow submitted the Draft Civil Procedure Code to the Minister of Justice in 1886. The Draft was re-examined by the government committee with another German, Mossey, who had come to Japan as advisor for the establishment of the constitution. Eventually, the Civil Procedure Code was enacted in 1890 and came into force in 1891 (hereinafter referred to as the 1890 CPC).

The 1890 CPC consists of eight chapters. It seems that the government committee carefully examined the first six chapters. However, it then simply added a translation of the German Civil Procedure Code established in 1877<sup>91</sup> in Chapter 7, "Procedure of Public Notice", and the Chapter 8, "Procedure of Arbitration."<sup>92</sup> The Meiji government preferred to establish the 1890 CPC quickly rather than to examine the Draft carefully.<sup>93</sup> Unlike the civil code whose establishment was postponed to adjust it to Japanese traditional culture, the establishment of the CPC was not postponed.

The new Civil Procedure Code was enacted on 26th June 1996 and came into force on 1st January 1998<sup>94</sup> (hereinafter referred to as the 1996 CPC). However, Chapter 7 "Procedure of Public Notice" and Chapter 8 "Procedure of Arbitration." in the 1890 CPC have been kept, and renamed as the Law on Procedure of Public Notice and Arbitration (hereinafter referred to as the Law on Arbitration). Since the numbering of articles in these parts is unchanged, they are called either Article of the 1890 CPC or the Law on Arbitration in this paper.

There was no substantial amendment of the rules on arbitration after the Meiji government copied the German Civil Procedure Code in 1890, although the original German rules have been essentially amended several times in accordance with social needs in Germany.

New rules have been added by international conventions. Japan ratified the

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<sup>91</sup> As regards development arbitration in Germany, there were many local custom laws based on Germanic cultures before the Roman law was firmly set in Germany in the Middle Age. On the local level, arbitration was the effective way of settling inter-city commercial disputes in the Hanseatic League. Rules in arbitration practised in these merchant cities were gradually systematised. In terms of unified law, when the Enlightenment brought the idea of codification in the 17th century, a comprehensive legislation was created based on the idea of the *jus gentium* of the Roman law. In the latter half of the 19th century, Germany established two comprehensive pieces of legislation. First, the Civil Procedure Code including provisions of arbitration was established in 1877. Second, the Civil Code (BGB) was established in 1896 and came into effect in 1900. The system of arbitration in the German Civil Procedure Code was regarded as one of the most liberal system in the world.

<sup>92</sup> Kojima, Takeshi. And Akira, Takakuwa. ed. *Chūkai Chūsai-hō*. Tokyo: Seirin-shoin, 1988: p.546.

<sup>93</sup> The Chapter 8 of the Japanese CPC, "Procedure of Arbitration," consists of Article 786-805. It was entirely copy of the Chapter 10 of the German Civil Procedure Code, with the exception of small changes of words.

<sup>94</sup> Hōrei 109.

1923 Geneva Protocol on 4th June 1928, the 1927 Geneva Convention on 11th July 1952, deposited the instrument of accession to the 1958 New York Convention with the Secretary-General of the UN on 20th June 1961, and ratified the 1965 Washington Convention on 17th August 1967.

## IV-C. Russia

### IV-C-1. Under the USSR Regime

The Foreign Trade Arbitration Commission (FTAC) was founded attached to the All-Union CCI on 17th June 1932 by the Statute of the Central Executive Committee and the Council of People's Commissars of the USSR.<sup>95</sup> The FTAC is one of the oldest permanent international commercial arbitral institutions in the world.<sup>96</sup>

The 1932 Statute on the FTAC stated that the FTAC was founded in order to settle, by way of arbitral examination, disputes which arose from legal transactions in foreign trade, in particular disputes between foreign firms and Soviet economic organisations (Article 1).

It was this Statute which made it compulsory to appoint arbitrators from among the members of the FTAC Commission (Article 4). This created what was one of the serious concerns about arbitration in Russia for foreign businessmen until very recently. Article 2 provided that the FTAC Commission should be comprised of 15 members appointed for one year by the Presidium of the All-Union CCI from representatives of trade, industrial, transport, and similar organisations, as well as from persons possessing special knowledge in the domain of foreign trade. At that time, not only in the USSR, but also in the other Eastern European countries, all members of arbitration commissions were composed exclusively of citizens of the country in question.<sup>97</sup>

The 1932 Statute on the FTAC was made detailed by the own rules of the FTAC established by the Presidium of the All-Union CCI of the USSR, that is, the Rules of Procedure for Cases in the FTAC attached to the All-Union CCI in 1949

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<sup>95</sup> Sobranie Zakonov i Rasporiazhenii SSSR, No. 48, 1932: Item 281.

<sup>96</sup> E.g., the London Court of International Arbitration (LCIA) was inaugurated as "the London Chamber of Arbitration" in 1892 (LCIA ed. An Introduction to the LCIA, London: Barnard & Westwood Ltd., 1995: p. 5). The ICC International Court of Arbitration was established in 1923 (ICC ed. ICC International Court of Arbitration, 2nd ed. Paris: ICC International Court of Arbitration, 1996: p. 1). The American Arbitration Association (AAA) was established in 1926, and the Japan Commercial Arbitration Association (JCAA) was founded in 1950.

<sup>97</sup> King-Smith, Sanford B. "Communist Foreign-Trade Arbitration." Harvard International Law Journal, Vol. 10, No. 1, 1969: p. 34 at 40 also footnote 22.

(the 1949 Rules on the FTAC).<sup>98</sup> The 1949 Rules on the FTAC were the first to recognise an agreement to arbitrate future disputes in a written form in the USSR.<sup>99</sup>

On 16th April 1975, the Presidium of the Supreme Soviet of the USSR adopted a new statute in accordance with the 1958 New York Convention,<sup>100</sup> the 1961 European Convention<sup>101</sup> and the 1972 Moscow Convention.<sup>102</sup> This was the Statute on the FTAC attached to the USSR CCI (*Постановление об Вне шнеторговой арбитражной комиссии при Торгово-промышленной палате СССР*) on 25th June 1975,<sup>103</sup> which repealed the 1932 Statute. The 1975 Statute declared that the FTAC was a permanently functioning arbitration court (Article 1).

The USSR CCI changed the rules of the FTAC, in line with the new 1975 Statute, and established the Rules of Procedure for Cases in the FTAC attached to the USSR CCI on 16th April 1975.<sup>104</sup> Replacing the 1949 Rules on the FTAC, the

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<sup>98</sup> See, Butler, William E. *Arbitration in the Soviet Union*. London: Oceana Publications Inc., 1989: pp. 118-124.

<sup>99</sup> It is unclear whether or not, the 1932 Statute of the FTAC recognised this principle from the provisions.

<sup>100</sup> *Vedomosti Verkhovnogo Soveta SSSR*. No. 46, 1960: Item. 421.

Ukraine and Belorussia also signed the Convention on 29th December 1958 and ratified it respectively on 10th October 1960 and 15th November 1960.

<sup>101</sup> *Id.* No. 44, 1964: Item 485.

With the assistance of the International Chamber of Commerce (ICC), the Committee on the Development of Trade in the UN Economic Commission for Europe (ECE) started to prepare unified rules of arbitration for both Western and Eastern Europe to meet this need. Eventually, Drafts were adopted by the Conference at Geneva between 10-20th April and signed on 21st April 1961. This Convention came into force in the USSR on 7th January 1964. Incidentally, though the 1961 European Convention was prepared by the ECE, neither the UK, Netherlands, Sweden, Norway, Portugal are member countries.

The 1961 European Convention had two main aims. The first aim was to provide provisions for the appointment of arbitrators, selection of the place of arbitration and the form of arbitration proceedings in cases where the parties cannot agree on these matters. The second aim was to promote international trade especially between the Western and Eastern European countries. All East European countries signed the 1961 European Convention.

<sup>102</sup> The USSR and the member countries of the CMEA (Council for Mutual Economic Assistance or COMECON) signed the Convention for Solving by Arbitration of Civil Law Disputes arising from Relations of Economic, Scientific and Technological Co-operation in Moscow on 26th May 1972. The 1972 Moscow Convention was significant, because it prescribed arbitration as the only means of settling disputes arising from relations of economic, scientific and technological co-operation among the member countries. Arbitration had already been made mandatory by virtue of several treaties with the countries which were economically and politically dependent on the USSR.

The CMEA was dissolved on 28th June 1991 when representatives of the CMEA signed a protocol for the dissolution of the CMEA in Budapest. However, the 1972 Moscow Convention is still effective in cases among organisations of the member countries where the 1993 Law on the ICA cannot be applied. Accordingly, some cases may be directly referable to the 1972 Moscow Convention.

<sup>103</sup> *Id.* No. 17, 1975: item 269.

<sup>104</sup> See, Butler, William E. *Arbitration in the Soviet Union*. London: Oceana Publications Inc., 1989: pp. 127-149.



1975 Rules were approved by the Supreme Soviet of the USSR.<sup>105</sup>

The most significant difference between the 1949 Rules and the 1975 Rules relates to jurisdiction. The 1949 Rules limited the sphere of disputes in legal transactions to foreign trade between foreign firms and Soviet economic organisations. Strictly speaking, it appeared that disputes in the FTAC should involve Soviet organisations. In *Oscar A. Mayer (Switzerland) v. Cogis (Italy)*, the FTAC confirmed that it was in fact also competent for disputes between foreign parties.<sup>106</sup> In accordance with this, Article I of the 1975 Rules provided for disputes:

"deriving from contractual and other civil law relations  
arising between subjects of the laws of various countries  
when carrying out foreign trade and other international  
economic and scientific-technical ties."

The system of a list of arbitrators from which parties were entitled to choose the desired arbitrators was maintained in the 1975 Rules. According to leading Soviet expert on international arbitration, Sergei N. Lebedev, this was important because the personal qualities and qualifications of those acting on behalf of the arbitration court would determine the efficiency and public image of the court as an institutional arbitration.<sup>107</sup>

In the 1980's, the economic reforms led by Gorbachev also affected the system of arbitration. In particular, the Decree on Problems Connected with the Formation and Activity of Joint Ventures, International Associations with part ownership by Soviet and Foreign Organisations, Firms and Organs of Management (hereafter referred to as the 1987 Decree on Joint Ventures)<sup>108</sup> had a direct impact upon the problems of jurisdiction in arbitration.<sup>109</sup>

The 1987 Decree on Joint Ventures approved the formation of joint enterprises with non-socialist firms by ministries, departments, economic associations and enterprises. Under the instruction of the State Foreign Economic

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<sup>105</sup> *Vedomosti Verkhovnogo Soveta SSSR*, No. 29, 1975: Item 438.

<sup>106</sup> Butler, William E. ed. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission Nos. 74 to 148." *International Commercial Arbitration: Soviet Commercial and Maritime Arbitration*. New York: Oceana Publications, inc., 1989: Case No. 125.

<sup>107</sup> Lebedev, Sergei N. "International Commercial Arbitration in the Socialist Countries Members of the CMEA." *Recueil des Cours: Collected Courses of the Hague Academy of International Law*. Vol. 158, 1977: p. 87 at 132.

<sup>108</sup> *Vedomosti Verkhovnogo Soveta SSSR*, No. 2, 1987: Item 35.

<sup>109</sup> Until this Decree was issued, all the Soviet parties involved with international commercial arbitration were state organisations. The 1977 USSR Constitution prescribed that foreign trade and other type of foreign economic activity was based on state monopoly (Article 73-10). The USSR Ministry of Foreign Trade supervised foreign trade until 1986. On 19th August 1986, the State Foreign Economic Commission of the USSR Council of Ministers replaced it.

Commission of the USSR Council of Ministers, the great majority of commercial contracts with foreigners stipulated that arbitration was to be used to settle any disputes arising out of or connected with the subject of the contracts and that the parties waived their right to have recourse to an ordinary court of law.<sup>110</sup> However, in the case of disputes among joint ventures, the FTAC did not have jurisdiction, because the 1975 Rules on the FTAC limited its jurisdiction to disputes deriving from contractual and other civil law relations arising between those subject to laws of various countries. Disputes such as the above did not arise between those subject to laws of various countries but those subject to the USSR law only.

In order to deal with joint ventures, the 1975 Statute was replaced by the Statute on the Arbitration Court attached to the USSR CCI (*Положение об Арбитражном суде при Торгово-промышленной палате СССР*) (the 1987 Statute on the AC) on 14th December 1987 by an Edict of the Presidium of the USSR Supreme Soviet.<sup>111</sup> Under the 1987 Statute, the FTAC attached to the USSR CCI was renamed the Arbitration Court (AC) attached to the USSR CCI.<sup>112</sup> In accordance with the new 1987 Statute, new Rules of the AC attached to the USSR CCI (the 1988 Rules on the AC) were established by the Presidium of the USSR CCI on 11th March 1988.

Under the 1988 Rules, Article 1 removed the words “arising between those subject to laws of various countries.” Therefore, the AC became able to hear disputes involving joint ventures. In case No. 125/1988,<sup>113</sup> the AC decided that joint ventures were legal entities arising from international economic and science-technological relations; and disputes of such enterprises with other organisations were subject to the competence of the AC attached to the USSR CCI.

## IV-C-2. Under the RF Regime

The USSR itself ceased to exist by the Statute on Abrogation of the Treaty of the Formation of the USSR<sup>114</sup> on 12th December 1991, which formally declared an end to the Union Treaty of 1922. On the same day, Russia, Ukraine, and Belorussia agreed to establish the “Commonwealth of Independent States (CIS)” in Minsk.<sup>115</sup>

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<sup>110</sup> Butler, William E. *Arbitration in the Soviet Union*. London: Oceana Publication Inc., 1989: p. 8.

<sup>111</sup> *Vedomosti Verkhovnogo Soveta SSSR*, No. 50, 1987: Item 806.

<sup>112</sup> The term “FTAC” is used in all cases before 1988. After that, “AC” is used until the 1993 Law on the ICA is established.

<sup>113</sup> Kabatov, V. “Iz praktiki Arbitrazhnogo suda pri TPP SSSR.” *Vneshnyaya Torgovlya*. Vol. 1, 1990: p.38.

<sup>114</sup> *Vedomosti S'ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR*, No. 51, 1991: Item 1799.

<sup>115</sup> On 21st December, in Alma Ata, eight more republics of the USSR signed the CIS treaty:

Article 12 of the CIS Agreement stipulates that signatory states guarantee the fulfilment of their international obligations stemming from treaties and agreements of the former USSR. This means that the CIS in fact succeeded to the USSR. As a result, the CIS took over the rights and obligations of the 1958 New York Convention and the 1961 European Convention.

Following the formation of the CIS, the RSFSR Supreme Soviet issued the Decree on the Ratification of the Agreement on the Creation of the CIS on 12th December 1991.<sup>116</sup> Article 2 of the Decree stipulated that: for the purpose of creating conditions necessary for the realisation of Article 11<sup>117</sup> of the CIS Agreement, the norms of the former USSR should apply in the territory of the RSFSR until the adoption of equivalent legislation in the RSFSR.

Finally, on 25th December 1991, the RSFSR (Russian Soviet Federated Socialist Republic) was re-named, by removing “Soviet and Socialist Republic,” the Russian Federation (RF) or Russia.<sup>118</sup>

In terms of Russian law, the RF took over the obligations of the 1958 New York Convention when the CIS Agreement was signed, because the signatory countries of the 1958 New York Convention were the USSR, Ukraine and Belorussia, not including the RSFSR. This was disputed in the Moscow City Court in 1992. In the case in question, a Scandinavian company claimed enforcement of the award issued by the Arbitral Tribunal of the Stockholm Chamber of Commerce against the Russian defendant in the Court. The Russian defendant requested the Court to set aside the award on the grounds that the RF was not a signatory to the 1958 New York Convention. The Court dismissed the request of the Russian defendant, because the RF had adopted the obligations, including that of the Convention, according to Article 12 of the CIS agreements.<sup>119</sup>

On 7th July 1993, the Law on International Commercial Arbitration (the 1993 Law on the ICA, *Закон РФ о международном коммерческом арбитраже*), based on the UNCITRAL Model Law, was enacted by the RF Congress.<sup>120</sup> Unlike the 1987 Statute which was established by

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Armenia, Azerbaijan, Kazakhstan, Kirgizia, Moldavia, Tajikistan, Turkmenia and Uzbekistan.

<sup>116</sup> Id., No. 51, 1991: Item 1798.

<sup>117</sup> Article 11 of the CIS Agreement provides that from the moment of this Agreement is signed, the norms of third states, including the former USSR, may not be applied on the territory of the state signing the Agreement.

<sup>118</sup> *Vedomosti S"ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR*. No. 2, 1992: Item 62.

<sup>119</sup> “Moscow District Court (Civil Department), 12 October 1992.” *Yearbook: Commercial Arbitration*. Vol. 21, 1996: p. 666 at 666-7.

<sup>120</sup> *Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF*. No. 32, 1993: Item 1240.

the Presidium of the Supreme Soviet of the USSR and the 1988 Regulations approved by the USSR CCI, the 1993 Law on the ICA was enacted by the RF Congress as a general law on international commercial arbitration.

Under the 1993 Law on the ICA, the AC was re-named as the International Commercial Arbitration Court (ICAC). Article 1 of the Schedule 1<sup>121</sup> of the Law on the ICA provides: "the ICAC is an independent, permanently functioning arbitral institution (*мремеуцкйуу суг*) acting under the 1993 Law on the ICA." Article 4 clarifies that the ICAC attached to the RF CCI is the successor of the Arbitration Court attached to the USSR CCI established in 1932, and has the right to settle disputes on the basis of the parties' agreement to bring disputes to the ICAC.

One of the characteristics of the Law on the ICA is that the Law grants significant power to the President of the RF CCI. For example, in the absence of agreement as to the procedure for appointing an arbitrator or arbitrators, at the request of either party, the arbitrator can be appointed by the President (Article 11-3).<sup>122</sup>

In accordance with the 1993 Law on the ICA and its Schedules, the RF CCI approved the Rules of International Commercial Arbitration Court (1994 Rules on the ICAC), which is also based on the UNCITRAL Model Law, on 8th December 1994. The Regulations came into force from 1st May 1995. They retain the system of the list of arbitrators. However it is now possible to appoint arbitrators from outside the list (Section 2-3).

Unfortunately, the presence of corruption in the ICAC was suggested in *AAOT Foreign Economic Association V O Technostroyexport v. International Development and Trade Services, Inc.*<sup>123</sup> in the USA. It was alleged that the Secretary of the ICAC and his superior agreed to accept bribery. However, the Court judged that the plaintiff waived the right to object because he continued the arbitration without objections, and received the award in the ICAC.

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<sup>121</sup> Schedule 2 is about the MAC attached to the RF CCI.

<sup>122</sup> The President can also take necessary measures, at the request of either party, if the parties do not observe the procedure the procedure for appointing arbitrators (Article 11-4). The President may, at the request of either party, take a decision on the rejection of an arbitrator (Article 13-3) and settle the dispute if the arbitrator turns out to be unable to carry out his duties (Article 14-1).

<sup>123</sup> *AAOT Foreign Economic Association V O Technostroyexport v. International Development and Trade Services, Inc.* [1997] US Court of Appeals for the Second Circuit Docket No. 97-9075. This information is obtained by courtesy of Mr. V. V. Veeder QC.

# PART II. Jurisdiction Relating to Arbitration

## Chapter 2. Seat of Arbitration

As mentioned in the previous chapter, arbitration is not a universally common way of dispute settlement. For example, it is still not so popular in Japan. As persons who try cricket for the first time may be at loss with its complicated rules and cannot play well, persons who are not familiar with arbitration cannot always succeed in drafting a complete arbitration clause. However, even with an incomplete arbitration clause, it is possible, to some extent, to promote arbitration with the assistance of the courts. Once arbitrators are appointed, they can decide procedural issues. However, they cannot usually decide issues against mandatory rules of the country where arbitration is to be held.

The questions of procedure permeates the whole process of arbitration. Courts can assist some procedure. Thus, first of all, the jurisdiction of the court over arbitration must be determined. The seat of arbitration has a decisive meaning in this regard.

## I. England

### I-A. Specification of the Seat

#### I-A-1. Before the Arbitration Act 1996

The seat theory means that an arbitration is governed by the law of the place where the arbitration is held, this is, the "seat," "forum" or "locus arbitri."<sup>1</sup> It sounds straightforward, but in fact the seat theory is something of a new departure.

Before the Arbitration Act 1996, the basic principle of English law as regards jurisdiction in the field of arbitration was that the courts had discretionary powers under common law.<sup>2</sup> Since the English courts can have jurisdiction by service of proceedings, they had quite wide discretionary power as regards arbitration, irrespective of whether an arbitration was held in England or not.

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<sup>1</sup> Redfern, Alan and Hunter, Martin. Law and Practice of International Commercial Arbitration. London: Sweet & Maxwell, 1991: p. 81.

<sup>2</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 87.

Some of the basic criteria were, however, quite similar with the seat theory: the English court exercises jurisdiction and recognises the jurisdiction, only if the seat of the arbitration is within the territory where that court exercises jurisdiction.<sup>3</sup> Consequently, the English court did not recognise “floating” or “delocalised” arbitration without a seat. In *Bank Mellat v. Helliniki Techniki*,<sup>4</sup> Kerr L. J. stated: “Despite suggestions to the contrary by some learned writers under other system, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.”<sup>5</sup> Thus, the recognition of jurisdiction of courts in England was based on courts’ discretionary power, and if the seat was within the territorial jurisdiction, the jurisdiction was very likely to be confirmed.

Before the identification of the seat, therefore, the courts could recognise jurisdiction using their discretionary power. For example, if there was an arbitration clause suggesting the method of appointing arbitrators, the courts could have jurisdiction by service of a writ, and had discretionary power to appoint arbitrators. In *Gola Sports Ltd. v. General Sportcraft Co. Ltd.*,<sup>6</sup> an English shoe-maker and an American shoe-seller concluded an arbitration agreement: “this agreement is governed by English law, and in the event of dispute, an independent arbiter nominated by the Anglo-American Chamber of Commerce should, however, arbitrate.” This Chamber did not exist. The English party applied to the English court for the appointment of an arbitrator under Section 10 of the Arbitration Act 1950.<sup>7</sup> The American defendants, however, wanted an arbitrator to be appointed by the New Jersey courts. The English court refused to appoint an arbitrator on the grounds that the US courts were more suitable to deal with the matter. Thus, in this case, the English court recognised jurisdiction, but transferred the power to appoint an arbitrator.

In this case, Lord Justice Dunn stated: “what was important to the parties was not the method of nominating the arbitrator but that the matter be resolved by

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<sup>3</sup> Id. at 86.

<sup>4</sup> *Bank Mellat v. Helliniki Techniki (C.A.)*. [1984] 1 QB 291.

<sup>5</sup> Id. at 301.

<sup>6</sup> *Gola Sports Ltd. v. General Sportcraft Co. Ltd.* [1982] Com LR 51.

<sup>7</sup> Section 10(a) provided that, when an arbitration agreement provides that reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the High Court or judge thereof may, on application by the party who have the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

arbitration and not in the public courts.”<sup>8</sup> Consequently, English courts can have jurisdiction over arbitration even where an arbitration agreement does not indicate the seat of arbitration or the proper way of appointing arbitrators, if they regard it suitable to deal with the case within English jurisdiction.

Thus, before the Arbitration Act 1996, recognition of jurisdiction relating to arbitration was based on the courts’ discretionary power under common law. The seat within the territorial jurisdiction was significant, but not decisive.

## I-A-2. Under the Arbitration Act 1996

Jurisdiction over arbitration prior to 1996 was left to common law. The Arbitration Act 1996 accepted, for the first time in English history, the seat theory in statute, under which its mandatory provisions apply where the seat of the arbitration is in England. Section 2(1) of the Arbitration Act 1996 provides that the provisions apply where the seat of the arbitration is in England and Wales or Northern Ireland.

There are exceptions to the seat theory, that is, the English courts can have jurisdiction, even if the seat is outside England, in cases of stay of legal proceedings (Section 9-11), and enforcement of arbitral awards (Section 66). The terms “the seat is outside England” suggest that the Arbitration Act 1996 does not, as previous precedents, recognise floating or delocalised arbitration without the seat in a country.

Section 3 provides that the seat is the juridical seat of the arbitration designated by the parties, or any arbitral institutions or arbitral tribunals vested by the parties with that power, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances. This is the provision on jurisdiction, that is, classification of the seat in England under this Act means that the seat is the juridical seat, and the English courts have jurisdiction. In this case, service of arbitration application is easily authorised under Rules of Supreme Court (RSC) Order 73 Regulation 7(1).

Thus, in place of the court's discretionary power on jurisdiction over arbitration before the Arbitration Act 1996, it establishes basic statutory rules of jurisdiction over arbitration. The seat theory takes precedence over common law rules on jurisdiction by the Arbitration Act 1996. The court’s discretionary power on jurisdiction over arbitration must be exercise in harmony with the Arbitration Act 1996. The seat theory is a unique principle on international jurisdiction in the field of arbitration. It is not only a new provision on arbitration under the Arbitration Act 1996 but also establishes a new order on jurisdiction over arbitration in England.

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<sup>8</sup> *Gola Sports Ltd. v. General Sportcraft Co. Ltd.* [1982] Com LR 51, 52.

The Arbitration Act 1996 also codified the common law rules on the court's discretionary power on jurisdiction over arbitration. For example, the English courts have discretionary power on jurisdiction over issues of securing the attendance of witnesses and support of arbitral proceedings (Section 2(3)(a) and (b)). Furthermore, Section 2(4) provides that the English courts have the discretionary power, not mentioned as the exception in the Act, over issues where no seat of the arbitration has been designated and the court is satisfied to have jurisdiction by reason of a connection with England. After all, the Arbitration Act 1996 clearly codified the seat theory, and also gave statutory form to some traditional rules on jurisdiction over arbitration based on the court's discretionary power.

### I-A-3. Designation of Seat

Under the seat theory in the Arbitration Act 1996, the seat can be determined by the parties' agreement. The designation of either England as the place of arbitration or English law as the procedural law can be considered as the seat in England. As regards the place of arbitration, in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*,<sup>9</sup> Lord Mustill stated that it was irresistible to conclude that the parties agreed, when contracting to arbitrate in a particular place, that arbitration was to be governed by the law of that place.<sup>10</sup> This seems straightforward. However there is possibility that, although the place of arbitration is designated in a country, a real arbitral procedure is held in another country.

The Arbitration Act 1996 can also be applied in so far as the parties agree on England as the seat of arbitration, even if the arbitral proceedings were or are to be held in a foreign country.<sup>11</sup> However, in such a case, the parties may not be able to agree on arbitral issues contrary to mandatory rules in the foreign country. Similarly, the parties cannot ignore mandatory rules in the Arbitration Act 1996 in so far as arbitration was or is to be held in England, even if the parties agree otherwise.

As regards the indication of English law as procedural law, in *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*,<sup>12</sup> Lord Justice Kerr suggested that when the procedural law of an arbitration is to be the law of X, X is to be the seat of arbitration. One further consequence is that the courts competent to control or assist the arbitration are the courts exercising jurisdiction at

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<sup>9</sup> *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] AC 334.

<sup>10</sup> Id. at 357-358.

<sup>11</sup> Satô, Yasunobu. "Funsô-shori-no Minei-ka? Jitsumuka-no-tame-no 1996-nen-Eikoku-chûsai-hô-gaisetsu." *JCA Jânaru*. Vol. 45, No. 6, 1998: p. 2 at 6.

<sup>12</sup> *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*. [1988] 1 Lloyd's Rep. 116.



X.<sup>13</sup> Thus, if English law is indicated as procedural law, in the absence of clear provision to the contrary, English courts have jurisdiction.

Even if the arbitration is held in a foreign country, English courts can have jurisdiction as regards support of arbitral proceedings on the basis of exceptional provisions to the seat theory, as mentioned above. The RSC Order 73 Regulation 8(1) provides that service out of the jurisdiction of an arbitration application is permissible with the leave of the Court if the application is for an order under Section 44 of the Arbitration Act 1996 (court power exercisable in support of arbitral proceedings), notwithstanding that no other relief is sought. In this context, even if the seat is not determined, English courts can have jurisdiction, which will be discussed below.

## I-B Non-Specification of the Seat

### I-B-1. Arbitration Clause without the Seat

Usually, the place of arbitration is fixed by the parties in arbitration agreements.<sup>14</sup> However, a perfect arbitration agreement is not always drafted, and the place of arbitration is not always agreed.

One of the most simple valid arbitration clauses is: "disputes must be settled by arbitration."<sup>15</sup> In *Hobbs Padgett & Co. (reinsurance), Ltd. v. J. C. Kirkland, Ltd., and Kirkland*,<sup>16</sup> Lord Justice Salmon implied that an arbitration clause "arbitration" could be valid.<sup>17</sup> In this case, the validity of the following arbitration clause was disputed: "Suitable Arbitration Clause." Lord Justice Salmon distinguished between a clause which was meaningless and a clause which was yet to be agreed, based on the words of Denning L. J. in *Nicolene Ltd. v. Simmonds*.<sup>18</sup> Lord Justice Salmon concluded that the word "suitable" did not make the clause entirely meaningless. However, it was quite possible to construe the meaning, for example, with the assistance of the Arbitration Act 1950, under which an arbitrator would be appointed by the Court.<sup>19</sup>

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<sup>13</sup> Id. at 119-120; see also, *ABB LUMMUS Global Limited v. Keppel Fels Limited*. [1998] 12 Construction Law Newsletter 3 at 4.

<sup>14</sup> Jarvin, Sigvard. "The ICC Arbitration Process Part V: The Place of Arbitration." *The ICC International Court of Arbitration Bulletin*. Vol. 41, No. 2, 1993: p. 7 at 9.

<sup>15</sup> In *Tritonia Shipping Inc. v. South Nelson Forest Products Corporation* ([1966] 1 Lloyd's Rep. 114), the arbitration clause, "Arbitration to be settled in London," was recognised as valid.

<sup>16</sup> *Hobbs Padgett & Co (Reinsurance), Ltd. v JC Kirkland Ltd., and Kirkland*. [1969] 2 Lloyd's Rep. 547.

<sup>17</sup> Id. at 549.

<sup>18</sup> *Nicolene Ltd. v. Simmonds*. [1953] 2 W.L.R. 717.

<sup>19</sup> *Hobbs Padgett & Co (Reinsurance), Ltd. v JC Kirkland Ltd., and Kirkland*. [1969] 2 Lloyd's Rep.

Thus, even under a simple arbitration clause "Arbitration," arbitration can be held with the assistance of the courts. In domestic arbitration, especially it may be very possible, with such an arbitration clause without identification of the seat of arbitration, to promote arbitration.

It is also possible to promote arbitration with a simple arbitration clause without designation of the seat of arbitration, if the submission or reference is made for arbitration under the rules of some arbitral institutions. For example, Article 16 of the 1998 LCIA Rules<sup>20</sup> provides that, failing to agree the seat of arbitration, the seat shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate. Similarly, Article 14 of the 1998 ICC Rules provides that the place of the arbitration shall be fixed by the International Court of Arbitration<sup>21</sup> unless agreed upon by the parties.

However, in international arbitration without reference to rules of permanent arbitral institutions, serious problems arise, if the seat of arbitration has not been decided.

## I-B-2. Determination of Seat under the Arbitration Act 1996

As an exception to the seat theory, the English courts have discretionary power on jurisdiction over arbitration, even if the seat of arbitration has not been decided. Section 2(4) provides:

The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where (a) no seat of the arbitration has been designated or determined, and (b) by reason of a connection with England the court is satisfied that it is appropriate to do so.

Section 3 of the Arbitration Act 1996 also provides:

In this Part "the seat of the arbitration" means the juridical

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547 at 549.

<sup>20</sup> The LCIA is the central body of the LCIA and promotes the effective operation of the arbitration system in the LCIA. It consists of a President, four Vice-Presidents, and up to twenty-six other members carefully selected in the field of international commercial arbitration (Preamble of the 1998 LCIA Rules).

<sup>21</sup> The International Court of Arbitration is the arbitration body attached to the ICC. The Court does not itself settle disputes, but has the function of ensuring the application of the ICC Rules (Article 1-2). Members of the Court are appointed by the Council of the ICC (Article 1-1).

seat of the arbitration designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

The English courts may thus exercise a power for the purpose of supporting the arbitral process where no seat of the arbitration has been designated or determined, if the English court is satisfied that it is appropriate to do so, having regard to the parties' agreement and all the relevant circumstances. Connection with England is a significant factor. Although it was the case of an order for security for costs, in *Bank Mellat v. Helliniki Techniki*,<sup>22</sup> Kerr L. J. stated: "particular regard should be given to the degree of connection that the parties or the arbitration have with this country and its legal system."<sup>23</sup>

The following can constitute a connection with England: one of the parties is English or resides in England, the business place of one of the parties is in England, the law applicable to the arbitration agreement is English law, the arbitration agreement is concluded in England, the proper law of the main substantive contract is English law, or the place of performance of the main substantive contract is England. Then, the English court can issue leave for service out of the jurisdiction in order to determine the seat of arbitration.<sup>24</sup>

In practice, however, the determination of the seat of international arbitration by English courts is likely to achieve a very vulnerable result in terms of enforceability, unless the respondent resides and his enforceable assets are located in England. If the respondent opposes the seat of arbitration decided by the English court, the respondent can oppose the enforcement of the award in the court in his or her country as being contrary to public policy in terms of the 1958 New York Convention (Article V-2-b) on the grounds of lack of jurisdiction or no valid arbitral proceedings. If the award issued by the arbitral tribunal in which the seat was designated by the English court is unlikely to be enforced, the determination of the seat by an English court may be in vain.

As mentioned above, the rules on jurisdiction over arbitration including the

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<sup>22</sup> *Bank Mellat v. Helliniki Techniki* (C.A.). [1984] 1 QB 291.

<sup>23</sup> *Id.* at 303.

<sup>24</sup> RSC Order 73 Regulation 8(4) provides that service out of the jurisdiction of any order made on an arbitration application is permissible with the leave of the Court.

seat theory and its exceptional auxiliary rules are clearly stated in the Arbitration Act 1996. Therefore these rules must be applied, and English courts may be able to determine the seat even if an arbitration agreement does not designate the seat. The exceptional rules to the seat theory, that is, determination of the seat by courts, can be also inferred from the courts' discretion on jurisdiction under the traditional rules under common law. Then, the common law principle of *forum non conveniens* seems to be helpful for courts' discretionary power on determining international jurisdiction.

In *Spiliada Maritime Corporation v. Cansulex Ltd.*,<sup>25</sup> House of Lord stated that the court had to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice, identifying the correct test and considering the relevant factors, including the advantages of efficiency, expedition and economy in bringing the action in England.<sup>26</sup>

The eventual high possibility of unenforceability of arbitral awards may be contrary to the need for expedition and economy in an action. This can be a factor for the application of *forum non conveniens*. If a respondent is abroad and consequently his or her enforceable property is likely to be abroad, it may be safer for the English court not to recognise its jurisdiction in terms of determination of the seat. However, simple rejection of jurisdiction is not a good solution. The possibility of international judicial co-operation is discussed below.

## II. Japan

### II-A. Specification of Seat

#### II-A-1. Seat as the Agreement on Jurisdiction

The seat theory provides the principle that the seat of arbitration in a country means jurisdiction in that country. This can be achieved only by legislative provisions or court practice to this effect.

In Japan, there is no legislative provision or precedent which accepts the seat theory. The seat in Japan is, however, a significant factor for the jurisdiction of the Japanese courts. According to experts in arbitration in Japan, it is unlikely that Japanese courts would recognise an agreement to foreign jurisdiction over arbitration held in Japan or an agreement to a Japanese court's jurisdiction over arbitration held in a foreign country.<sup>27</sup> As a result, if arbitration is held in Japan, Japanese courts

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<sup>25</sup> *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460 (H.L.).

<sup>26</sup> *Id.* at 460-461.

<sup>27</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai Chūsai-hō*. Tokyo: Seirin-shoin, 1988: p. 211.

must have jurisdiction. If the seat of arbitration is Japan, the parties can apply foreign procedural law on arbitration, but its scope must be within the Japanese CPC.<sup>28</sup>

Thus, the seat of arbitration in Japan brings the Japanese jurisdiction and application of Japanese law on arbitration. The logic behind this is complex in so far as it interacts with the Japanese traditional rules on international jurisdiction. Under the traditional rules, respondents must have residence or a place of business in Japan, unless the parties clearly agree to Japanese jurisdiction. Traditionally, Japanese rules on international jurisdiction are based on territorial jurisdiction. In the case of international arbitration, it quite often happens that the parties choose the place of arbitration in a neutral country. If foreign parties choose Japan as the place of arbitration, the Japanese traditional rules on international jurisdiction cannot explain the basis of recognition of the Japanese jurisdiction.

The simplest approach is to regard that an agreement on arbitration in Japan implies agreement to the Japanese jurisdiction. This is clearly recognised in Japan. In the case of *Tokyo-chi-han* S33.1.25.<sup>29</sup>, a Japanese party and an Australian party concluded an arbitration agreement providing that each party should appoint an arbitrator in Japan if disputes arose. When a dispute arose, the Japanese party appointed an arbitrator. However the Australian party did not. Therefore, the Japanese party asked a Japanese court to appoint an arbitrator on behalf of the Australian party based on Article 789-2 of the Law on Arbitration. This provides that the court can appoint an arbitrator on behalf of party B upon request of party A when the party B did not appoint an arbitrator within seven days after being requested to do so. The Tokyo District Court recognised the application of Article 789-2 of the Law on Arbitration, and appointed an arbitrator on behalf of the Australian party. The basis of jurisdiction in Japan in this case seems to be that the court regarded indication of appointment of an arbitrator in Japan as the agreement of the Japanese jurisdiction.

Another basis for recognising Japanese jurisdiction is by reference to Japanese procedural law. As mentioned above, in England, in *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*,<sup>30</sup> it was confirmed that the basic consequence of the application of the English law on arbitration was the seat in England and recognition of the English jurisdiction. However, it is quite

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<sup>28</sup> *Dai-han* T7.4.15. (*Min-roku*, Vol. 24, 1918: p.865) (Great Court of Judicature's Judgement on 15th April 1918).

<sup>29</sup> *Tokyo-chi-han* S33.1.25. (*Ka-min-shû*, Vol. 9, p. 111) (Tokyo District Court's Judgement on 25th January 1958).

<sup>30</sup> *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*. [1988] 1 Lloyd's Rep. 116.

possible that arbitration under a country's procedural law can be held in another country.

Strictly speaking, there are no precedents indicating that arbitration in Japan necessarily means agreement to Japanese jurisdiction or that the application of Japanese procedural law implies recognition of the Japanese jurisdiction. With regard to legislative provisions and precedents, it is not clear whether or not the Japanese court has jurisdiction, if the arbitration is held in Japan by the foreign parties without residence or place of business in Japan and according to foreign procedural arbitration rules.

The easiest way to deal with this issue is to accept the seat theory. There is a preference for the seat theory among Japanese scholars. They explain that the Japanese court should have jurisdiction and should co-operate in arbitrations between foreign parties held in Japan, simply because they are held within the territory of Japan, and it is most convenient in practical terms for the parties. They do not necessarily consider as part of their reasoning the principle of territorial jurisdiction over procedural matters.

Article 45 of the "Draft Text of Law of Arbitration" follows the seat theory.<sup>31</sup> It provides that "The court may extend assistance and co-operation and render a judgement in the action for setting aside the arbitral award only in connection with an arbitration the place of which is Japan. When the place of arbitration has not yet been settled, assistance and co-operation may be extended only when the arbitration has a close relationship to Japan."

## II-A-2. As the Place of Performance of the Obligation

The other possible reasoning behind recognition of Japanese jurisdiction over arbitration held in Japan may be that Japan is the place of performance for the obligation subject to arbitration, although this possibility is hardly mentioned in Japan.

Some scholars support the recognition of Japanese jurisdiction if the place of performance of the obligation is in Japan.<sup>32</sup> If Japan is indicated as the place of arbitration, both parties have an obligation to promote arbitration in Japan.

In *Tokyo-chi-han* S47.5.2.,<sup>33</sup> recognition of jurisdiction on the basis of the

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<sup>31</sup> Chûsai-kenkyû-kai ed. *Bessatsu NBL No. 25: Chûsai-hô no Rippô-ron-teki-kenkyû: Chûsai-shian to Sono-kaisetsu*. Tokyo: Shôji-hômu-kenkyû-kai, 1993: p. 107.

<sup>32</sup> See. e.g. Ikehara, Sueo. "Kokusai-teki-saiban-kankatsu-ken." *Shin Jitsumu-minji-soshô-kôza Vol. 7*. Chûichi Suzuki and Akira Mikazuki ed. Tokyo: Nihon-hyôron-sha, 1982: p. 3 at 26-28.

<sup>33</sup> *Tokyo-chi-han* S 47.5.2. (Han-ji Vol. 667, p. 47) (Tokyo District Court's Judgement on 2nd May 1972).

place of performance of a monetary obligation was denied in the case of the recognition of foreign judgement. This was because such jurisdiction may be inconvenient to parties outside of the jurisdiction. Some scholars suggest that the Japanese courts should not recognise jurisdiction simply because the place of performance of obligation is in Japan, but that economy of litigation and fairness to the parties must be considered.<sup>34</sup>

If this suggestion is accepted, the Japanese courts should have jurisdiction in so far as arbitration is held in Japan. Needless to say, it is most convenient for the parties and Japanese courts to recognise the jurisdiction of the Japanese courts if arbitration is held in Japan.

## II-B Non-Specification of the Seat

### II-B-1. Japanese Jurisdiction

In Japan, there are no legal rules or precedents which accept the seat theory. Therefore, the seat is not a necessary condition for recognition of the jurisdiction by the Japanese court, and consequently, even before the determination of the seat in Japan, Japanese courts can have jurisdiction if the ordinary rules on international jurisdiction are satisfied. Such cases must be regarded as exceptions to the seat theory as contained in the Arbitration Act 1996 in England.

Although the traditional rules on international jurisdiction in Japan are inclined to territorial considerations, recent precedents and theories have indicated liberation from the rules on territorial jurisdiction. The theory of balance of jurisdiction on international procedures, considering justice, fairness, and expediency of the trial (*kankatsu-haibun-setsu*) is respected by Japanese precedents following the judgement of the Supreme Court on 25th March 1964.<sup>35</sup> However, this theory still lacks clear criteria. There are three possible responses to it. Two of three are still influenced by territorial jurisdiction.

The first is to apply rules of domestic territorial jurisdiction and grant or deny jurisdiction from the viewpoint of international procedure.<sup>36</sup> The second is to infer rules of domestic territorial jurisdiction, and decide proper jurisdiction from a consideration of international procedures.<sup>37</sup> The third is to balance the benefits of

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<sup>34</sup> See, e.g. Sawaki Takao. *Kokusai-shihô-nyûmon*. Tokyo: Kabushiki-gaisha Yûhikaku, 1984: p211.

<sup>35</sup> *Sai-han* S39.3.25. (*Min-shû*. Vol. 18, No. 3, p. 486) (Supreme Court's Judgement on 25th March 1964).

<sup>36</sup> *Sai-han* S61.6.2. (*Han-ji*. No. 1196, p. 87; *Han-ta*. No. 604, p. 138) (Supreme Court's Judgement on 2nd June 1986).

<sup>37</sup> Kidana, Shôichi; Matsuoka, Hiroshi; and Watanabe, Satoshi. *Kokusai-shihô-gairon*. Kabushiki-gaisha Yûhikaku, 1991: pp. 246-247.

jurisdiction, against facts which connect the case with Japan, irrespective of the rules of domestic territorial jurisdiction.

In *Sai-han* S56.10.16.,<sup>38</sup> the Supreme Court recognised Japanese jurisdiction in a case in which the Japanese family of the deceased in an aeroplane crash in Malaysia brought a claim for compensation from an airline company in Malaysia to the Japanese court. The Supreme Court basically followed the first approach. However, it stated that it was difficult to deny jurisdiction in Japan when there were several connections with Japan, irrespective of the rules of domestic territorial jurisdiction.

Precedents also point to the first approach, and considers the domestic territorial jurisdiction. However, if there are special conditions (*tokudan no jijyô*), this principle can be amended.<sup>39</sup>

By adopting the third approach, Japanese courts should consider co-operation with arbitration if there are any connections with Japan, irrespective of the domicile of the defendant. It is most convenient for the parties and Japanese courts to recognise the jurisdiction of the Japanese courts if arbitration is closely connected with Japan.

## II-B-2. Appointment of Arbitrator

Japanese law does not follow the seat theory, and consequently, the seat of arbitration in Japan is not a necessary condition for the application of Japanese law on arbitration. Therefore, the court may be able to appoint an arbitrator on behalf of a foreign party if the court recognises the Japanese jurisdiction on the grounds of any factors connected with Japan: for example, one of the parties is Japanese or resides in Japan, the business place of one of the parties is in Japan, the law applicable to the arbitration agreement is Japanese law, the arbitration agreement is concluded in Japan, the law applicable to the main substantive contract is Japanese law, or the place of performance of the main substantive contract is Japan. Professor Ishiguro states that Japanese jurisdiction should be recognised if there is either personal or material connection with Japan in the case.<sup>40</sup>

If the Japanese court recognises the jurisdiction, and appoints arbitrators on the basis of Article 789-2 of the Law on Arbitration, they may decide the seat of

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<sup>38</sup> *Sai-han* S56.10.16. (*Min-shû*. Vol. 35, No. 7, p. 1224) (Supreme Court's Judgement on 16th October 1981).

<sup>39</sup> *Sai-han* H9.11.11. (*Han-ji*. No. 1626, p. 74) (Supreme Court's Judgement on 11th November 1997).

<sup>40</sup> Ishiguro, Kazunori. *Kokusai-minji-funsô-shori no shinsô*. Tokyo: Kabushiki-gaisha Nihon-hyôron-sha, 1992: p. 23.



arbitration by analogy with Article 794-2 of the Law on Arbitration, which provides that an arbitrator can decide rules of the arbitral procedure if there is no agreement of the parties.

Finally, Article 45 of the "Draft Text of Law of Arbitration"<sup>41</sup> contains the position of the Japanese court regarding co-operation to decide the seat of arbitration. It provides that "When the place of arbitration has not yet been settled, assistance and co-operation may be extended only when the arbitration has a close relationship to Japan."

## III. Russia

### III-A. Specification of Seat

The 1993 Law on the ICA has accepted the seat theory. Article 1 of the 1993 Law on the ICA provides that the present law applies to international commercial arbitration if the place of arbitration is located within the Russian Federation. Article 6-2 of the 1993 Law on the ICA provides that the function of reviewing decisions of the ICAC on its own competence (Article 16-3) and reviewing decisions of the ICAC (Article 34-2) are exercised by the Supreme Courts of the RF, and by the regional and district courts. This court is an ordinary court, not an arbitrazh court.

Article 1 also provides exceptional rules to the seat theory. The law is applied, and consequently the Russian courts have jurisdiction irrespective of the seat in Russia, in the case of stay of court proceedings (Article 8), interim measures for arbitration (Article 9), and recognition and enforcement of arbitral awards (Article 35-36). Like the Arbitration Act 1996 in England, the 1993 Law on the ICA codified the seat theory and provided for limited exception to it.

### III-B. Non-Specification of the Seat

The USSR regime preferred to settle disputes arising from foreign trade in the FTAC or AC in so far as Soviet parties were involved. Under the strong administrative command system in the USSR, there was a set form of arbitration agreement which provided for settling disputes in the FTAC or AC. Consequently, issues concerning non-specification of the seat hardly came into question until after the end of the USSR regime.

Russia introduced the UNCITRAL Model Law as the 1993 Law on the ICA.

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<sup>41</sup> Chūsai-kenkyū-kai ed. Bessatsu NBL No. 25: Chūsai-hō no rippō-ron-teki-kenkyū: Chūsai-shian to sono-kaisetsu. Tokyo: Shōji-hōmu-kenkyū-kai, 1993: p.107.

Basically, the UNCITRAL Model Law makes no stipulation about issues before the seat of arbitration is defined.<sup>42</sup> As mentioned above, under the seat theory, the 1993 Law on the ICA cannot be applied unless the seat of arbitration is determined. Under the 1993 Law on the ICA, neither the president of the Russian CCI nor Moscow City Court can determine the seat of arbitration.<sup>43</sup> In the case of No. 47/1995,<sup>44</sup> the ICAC decided that it did not have competence to hear the dispute because the arbitration agreement provided for settlement of disputes by arbitration in a chamber of commerce, and did not indicate the country.

If both parties are from the member countries of the 1961 European Convention, it is possible to determine the seat of arbitration, even if the seat has not been specified. Article IV-3 of the 1961 European Convention provides that where the seat of arbitration has not been agreed upon, the claimant shall be entitled at his option to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee.<sup>45</sup> The President or the Special Committee shall determine the temporary seat of arbitration, provided that the arbitrators appointed by the court of the country of the temporary seat may fix another seat of arbitration.

## IV. Analysis: Comparison and Suggestions

### IV-A. Seat of Arbitration

#### IV-A-1. The Seat Theory

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<sup>42</sup> Holtzmann, Howard N. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1994: p.37.

<sup>43</sup> This understanding is based on the advice from Professor Ivan S. Zykin, Vice President of the ICAC.

<sup>44</sup> Rozenberg, M. G. ed. Praktika Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda: Nauchno-Prakticheskii Kommentarii. Moscow: Mezhdunarodnyi Tsentr Finanskovogo-Ekonomicheskogo Razvitiya, 1997: p. 166.

<sup>45</sup> The Special Committee shall consist of two regular members and a Chairman. The regular members and the Chairman shall be elected by the Chambers of Commerce or other institutions designated by the member states. The reference to the Special Committee shall be addressed to the Executive Secretary of the Economic Commission for Europe, which shall in the first instance lay the request before the member of the Special Committee. If the other member agree to the decision, it shall be deemed to be the Special Committee's decision. If the other member does not agree, the Executive Secretary of the Economic Commission for Europe shall convene a meeting of the Special Committee at Geneva. The decision shall be given by a majority vote among the two regular members and the Chairman. (Annex to the 1961 European Convention).

In England, Section 2(1) of the Arbitration Act 1996 provides that the provisions apply where the seat of the arbitration is in England and Wales or Northern Ireland. Section 3 of the Arbitration Act 1996 provides that the seat of the arbitration means the juridical seat. Thus, the seat theory in the Arbitration Act 1996 is the jurisdictional provision, and the classification of seat under the Act means juridical seat, that is, recognition of the jurisdiction of the English courts. When an arbitration agreement provides for an arbitration agreement to be held in England, the court authorises service of the arbitration application.

Similarly, in Russia, Article 1 of the 1993 Law on the ICA provides that the present law applies to international commercial arbitration if the place of arbitration is located within the Russian Federation. Article 2 stipulates that the word "court" in the Law signifies the corresponding organs in the state judicial system. Therefore, the classification of the seat under the 1993 Law on the ICA brings application of the Law when arbitration is in Russia, and results in arbitration being subject to jurisdiction in Russia.

Although the Japanese Law on Arbitration does not follow the seat theory, the Japanese court is likely to recognise the Japanese jurisdiction if the seat of arbitration is in Japan. The arrangement must not be contrary to the Japanese Law on Arbitration.

## IV-A-2. Exceptions to the Seat Theory

Thus, whether or not, the seat theory is accepted, in so far as arbitration is held in the three countries, the court in that country has the jurisdiction and the parties cannot be contrary to law on arbitration in that country. The seat theory is a jurisdictional provision on the law on arbitration in that country. The classification of the seat of arbitration under that law results in application of that law and jurisdiction of courts in that country. Unless other exceptional rules on international jurisdiction over arbitration are provided in law on arbitration, this jurisdictional provision must be applied exclusively.

The Arbitration Act 1996 and the 1993 Law on the ICA provide several exceptional rules to the seat theory. Such exceptions are that the English courts can have jurisdiction, even if the seat is outside England, in the cases of stay of legal proceedings (Section 9-11) and enforcement of arbitral awards (Section 66). Similarly, Article 1 of the 1993 Law on the ICA in Russia provides that this Law is applied, and consequently the Russian courts have jurisdiction irrespective of the seat in Russia, in the case of stay of court proceedings (Article 8), interim measures for arbitration (Article 9), and recognition and enforcement of arbitral awards

(Article 35-36).

In order to recognise jurisdiction over arbitration where the seat is not confirmed, a special provision is necessary under the seat theory. The Arbitration Act 1996 in England has such special provisions, but the 1993 Law on the ICA in Russia does not have. Section 2(4) of the Arbitration Act 1996 provides that the English court has the discretionary power over issues where no seat of the arbitration has been designated if court is satisfied to have jurisdiction by reason of a connection with England.

On the other hand, the 1993 law on the ICA does not have equivalent provisions, and consequently the Russian courts cannot have jurisdiction, unless the seat is clearly agreed by the parties. However, if both the parties are from the member countries of the 1961 European Convention, it is possible to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee.

In the case of Japan where the seat theory is not taken, first of all, the jurisdiction of the Japanese courts must be decided by applying ordinary rules on jurisdiction. Thus, the seat of arbitration in Japan is not a necessary condition, although it is very significant factor for recognition of the Japanese jurisdiction. Even before the seat of Japan is confirmed, the Japanese courts can have jurisdiction if ordinary rules on international jurisdiction are satisfied. If the defendant, that is, likely to be the respondent in arbitration, is in Japan, the Japanese courts can have jurisdiction. In theory, if there is any connection with Japan, Japanese courts can have jurisdiction by applying the theory of balance of jurisdiction on international procedures, considering justice, fairness, and expediency of the trial (*kankatsu-haibun-setsu*).

There are several possible connections with Japan in the case of arbitration, for example, one of the parties is Japanese or resides in Japan, the place of business of one of the parties is in Japan, the law applicable to the arbitration agreement is Japanese law, the arbitration agreement is concluded in Japan, the law applicable to the main substantive contract is Japanese law, or the place of performance of the main substantive contract is Japan. There are, so far, no clear criteria in this regard in Japan. These issues await further development.

#### IV-A-3. Suggestion for Understanding of International Jurisdiction over Arbitration in the Specific Regime of



# International Commercial Arbitration

As mentioned above, the seat theory is based on unique jurisdictional provisions in the field of arbitration. In England and Russia, special rules on international jurisdiction are established based on the seat theory. Thus, rules on international jurisdiction over arbitration should be established in the specific regime of international commercial arbitration rather than applying general rules on international jurisdiction in each country.

Table C3-1. Rules on International Jurisdiction over Arbitration

	England (Seat Theory)	Japan (Non-Seat Theory)	Russia (Seat Theory)
Basic rules on international jurisdiction relating to arbitration.	Classification of the seat of arbitration in England under the Arbitration Act 1996.	Connection with Japan.	Classification of the seat of arbitration in Russia under the 1993 Law on the ICA.
Exceptional rules to the seat theory in the case of no agreement on the seat.	English courts may determine the seat if there are relevant factors with England.	None, but Japanese courts may appoint arbitrators on behalf of the party if there are relevant factors with Japan, and they may determine the seat.	None, but if the both parties are from member countries of the 1961 European Convention, the seat can be determined by the Convention.

The seat theory is one of such jurisdictional rules in the field of arbitration. This brings exclusive rules on jurisdiction, and other exceptional rules on jurisdiction over arbitration to this theory must be established legislatively or as court practice in order to recognise jurisdiction before the seat is confirmed.

On the other hand, in the case of non-acceptance of the seat theory, the seat of arbitration in that country is also a very significant factor, but has equal status with other rules on jurisdiction. Consequently, even before the seat is confirmed, the court in that country can have jurisdiction if there are any reasons, which may be established by analogy with the general rules on international jurisdiction. These

rules based on the seat theory and its exceptions should be understood in the specific regime of international commercial arbitration rather than of the wide interpretation of general rules on international jurisdiction. There is a possibility for international judicial co-operation over jurisdiction in this specific regime.

## IV-B. Unified Rules on Jurisdiction in the Case of Non-Specification of the Seat

### IV-B-1. Arbitration as the Parties Choice

Under the seat theory, unless exceptional provisions provide otherwise, the determination of the seat and consequently recognition of the jurisdiction must be before the application of provisions for appointing arbitrators on behalf of one of the parties. Thus, in a country where the seat theory is accepted, determination of the seat has significant meaning.

Probably, in accordance with this, rules of permanent arbitral institutions in countries which have accepted the seat theory have provision in this regard. For example, the 1998 LCIA Rules (Article 16) and the 1998 ICC Rules (Article 14) provide a method of determining the seat. Because Japan does not accept the seat theory, the 1998 JCAA Rules do not have such a provision.<sup>46</sup>

As regards the law on arbitration, the Arbitration Act 1996 in England provides, as an exception to the seat theory, the rules on jurisdiction in order to determine the seat of arbitration. However, the 1993 Law on the ICA in Russia does not have such provisions, although the seat can be decided by the 1961 European Convention if both the parties are from member countries of the Convention.

In a country where the seat theory is not accepted, the application of provisions of appointing arbitrators can be made without determination of the seat. The appointed arbitrator can decide the seat.

As mentioned in the English case of *Gola Sports Ltd. v. General Sportcraft Co. Ltd.*,<sup>47</sup> the most significant element of choosing arbitration as the method of dispute settlement was regarded that the matter should be resolved by arbitration and not in the public courts.<sup>48</sup> Therefore, in so far as arbitration is agreed as the way of dispute settlement, legal rules and courts practice should be helpful to promote arbitration even if the seat or way of appointing arbitrators is not provided in an

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<sup>46</sup> The JCAA suggests users of the JCAA to select either Tokyo or Osaka as the place of arbitration (This information was obtained by courtesy of Mr. T. Nakamura in the JCAA).

<sup>47</sup> *Gola Sports Ltd. v. General Sportcraft Co. Ltd.* [1982] Com LR 51.

<sup>48</sup> *Id.* at 52.

arbitration agreement.

## IV-B-2. Enforceability

If a foreign party requests co-operation from a court in a country in order to determine the seat of arbitration against a defendant or likely respondent in the arbitration who resides in that country, whether or not, he or she has nationality of that country, the court may recognise its jurisdiction and determine the seat of arbitration, even if the respondent ignores the proceedings.

If a party asks a court in that country to determine the seat of arbitration against a respondent abroad, the court must consider whether there is a good reason to recognise jurisdiction. In such a case, since the seat of arbitration is not decided, it is unlikely that the law applicable to the arbitral procedure will be determined. Therefore, one of the significant factors in determining the seat of arbitration is the law applicable to the arbitration agreement.

If the law applicable to the arbitration agreement is the law in that country, this may be a reason to recognise the jurisdiction. If the law applicable to the arbitration agreement is foreign law, it is doubtful whether the court can recognise the jurisdiction. However, even if the court recognises the jurisdiction, simple determination of the seat of arbitration by the court cannot always bring an effective result. For example, when a foreign party who ignores the arbitration designated by the court simultaneously promotes arbitration with assistance of the court in his or her own country, there is no way to co-ordinate the two proceedings.

If the party promotes arbitration and receives an award without a parallel arbitration in the foreign country, the award may not be enforced in a court where the foreign respondent resides. The reason for this will be lack of jurisdiction or no valid arbitral proceedings in so far as the respondent opposes the seat of arbitration decided by the court. The respondent can oppose the enforcement of the award in the court in his or her country as being contrary to public policy in terms of the 1958 New York Convention (Article V-2-b). Even if the 1958 New York Convention is not applied, the enforcement of the award may be refused on grounds of public policy in the court of the country where the foreign respondent resides.

If a foreign party asks a court in another country to decide the seat of arbitration on the ground that the law applicable to the substantive contract is the law of that country, or the place of performance of the substantive contract is in that country, the court may recognise the jurisdiction. However, just as when a respondent resides abroad, even if the foreign claimant promotes arbitration designated by the court, and receives an award, the award may not be enforced in a

foreign court for the reason of lack of jurisdiction or no valid arbitral proceedings in so far as the foreign respondent does not approve the seat of arbitration decided by the court.

In effect, the only effective way to promote arbitration in the case where no seat has been determined is to request assistance in determining the seat of arbitration from the court of the country, where the respondent resides and his or her enforceable assets are very likely to be located.

### IV-B-3. International Judicial Co-operation

Therefore, the court in each country should consider resorting to international judicial co-operation in order to ask a foreign court to determine the seat of arbitration where no seat of the arbitration has been designated or determined. They should do so, if the other party resides in that country, or an award is to be enforced in that country, or the law applicable to the arbitration agreement is the law of that country.<sup>49</sup> The foreign court may decide the seat of arbitration as being in its own or in a neutral country,<sup>50</sup> or appoint an arbitrator, who may decide the seat of arbitration. In the case of the non-acceptance of the seat theory, the same rules can be applied in determination of jurisdiction in order to appoint an arbitrator on behalf of a party by court.

As mentioned above, a method of determining the seat is provided by major arbitral institutions. For example, Article 16 of the 1998 LCIA Rules provides that, failing to agree the seat of arbitration, the seat shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate. Similarly, Article 14 of the 1998 ICC Rules provides that the place of the arbitration shall be fixed by the International Court of Arbitration unless agreed upon by the parties. Therefore, if the parties agree to apply such rules, arbitration can be promoted even when the seat of arbitration is not designated at the beginning. However, not all rules of arbitral institutions contain such provisions. For example, the 1998 JCAA Rules in Japan and 1994 Rules on the ICAC in Russia do not provide a method of determining the seat of arbitration. Therefore, the issue of determination of the seat of arbitration arises under the law on arbitration.

The traditional reaction of courts in this regard in most countries is simply to

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<sup>49</sup> Yoshida, Ikko. "Determination of the Seat of Arbitration under the Arbitration Act 1996." Arbitration: the Journal of the Chartered Institute of Arbitrators. Vol. 64, No. 4: p. 292.

<sup>50</sup> Jarvin, Sigvard. "The ICC Arbitration Process Part V: The Place of Arbitration." The ICC International Court of Arbitration Bulletin. Vol. 41, No. 2, 1993: p. 7 at 9.



reject the claim, if the courts regard that foreign courts are more suitable to decide the seat of arbitration. For example, in *Gola Sports Ltd. v. General Sportcraft Co. Ltd.*,<sup>51</sup> the English court refused to appoint an arbitrator on the grounds that the US courts were more suitable to deal with the matter. Thus, the English courts recognised jurisdiction, but transferred the power to appoint an arbitrator, and the party could apply to the US court. However, the parties are temporarily put in "Alsatia,"<sup>52</sup> that is, a lawless place, until the US court recognises jurisdiction. Indeed, if the US court also rejects jurisdiction, the parties are literally in a lawless place.

Thus, it is better for courts to consider resorting to international judicial co-operation in order to ask a foreign court to determine the seat of arbitration where no seat of the arbitration has been designated or determined. After the completion of the determination of the seat by the foreign court or receiving an agreement from the foreign court in this regard, the court should transfer the jurisdiction rather than reject the jurisdiction or suggest another jurisdiction.

It seems that there is no great difference between transferring jurisdiction after receiving an agreement on jurisdiction of the foreign court and suggesting another jurisdiction. However, there is a significant gap between them. Any form of intervention in the judicial function of individual states may be regarded as a violation of sovereignty. Therefore, a new treaty on judicial co-operation in this regard may be necessary. However, in a sense, it is absurd that courts cannot simply co-operate in this regard by themselves. As a matter of common sense, if the court suggests a more suitable alternative jurisdiction, it should and can ask the another jurisdiction by itself whether or not jurisdiction can be established. This simple confirmation seems not to violate sovereignty of a state. If there is reluctance to recognise such practice on a general scale, then, as a last resort, the possibility of an international treaty to this effect should be considered.

The system of commercial arbitration has been internationally highly developed. Courts should resort to international judicial co-operation in harmony with this international development of commercial arbitration rather than putting the parties temporarily in a lawless place by simply suggesting another jurisdiction.

The court in each country should consider resorting to international judicial co-operation in order to ask a foreign court to determine the seat of arbitration where no seat of the arbitration has been designated or determined, if the other party resides

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<sup>51</sup> *Gola Sports Ltd. v. General Sportcraft Co. Ltd.* [1982] Com LR 51.

<sup>52</sup> *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478.

In this case, Scrutton L. J. proclaimed that there must be no Alsatia in England where the King's Writ does not run (478 at 488). "Alsatia" is the former name of the Whitefriars district in London which was famous as a lawless place.

in that country, or an award is to be enforced in that country, or the law applicable to the arbitration agreement is the law of that country. In such circumstances, in so far as the claimant agrees with international judicial co-operation, it is easy for the foreign court to recognise its jurisdiction, because the defendant is more closely connected with that foreign country. Therefore, this may be accomplished by simple judicial co-operation between the court and the foreign court.

That's one small step of mere transfer of jurisdiction with the completion of the task by the foreign court is one giant leap for international judicial co-operation in the specific regime of international commercial arbitration.

The EU countries seem easily to realise international judicial co-operation of this nature, because of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 1968 (1968 Brussels Convention). However, matters are not so simple, because issues of arbitration are excluded from the Convention, as will be discussed in detail in the following chapter.

## Chapter 3. Jurisdiction on Preliminary Issues

In the previous chapter, jurisdiction over arbitration based on the seat theory was discussed. In so far as there is an arbitration agreement, it is possible to promote arbitration with the assistance of national courts even if the seat of arbitration or the way of appointing arbitrators is not agreed by the parties. Jurisdiction is thus recognised on the basis of special rules on international jurisdiction as an exception to the seat theory.

Even if the seat theory is not accepted, the place of arbitration, to considerable extent, guarantees the jurisdiction of court in that country. However, if the existence or validity of an arbitration agreement is disputed, the basis of jurisdiction over arbitration based on the seat or place of arbitration itself becomes vulnerable. Then, under the traditional rules on international jurisdiction which are inclined to territorial limitation, it may be difficult for the court to recognise its jurisdiction if there is no connection with that country except an indication of the seat of that country on the disputed arbitration agreement.

In the above case, another possibility for jurisdiction is that which one of the parties comes from. However, it also seems to be difficult to recognise jurisdiction on the basis of such a personal connection in some countries. The issue of the existence or validity of an arbitration agreement is directly connected with the issue of jurisdiction. Therefore, this preliminary issue has significant meaning in arbitration.

### I. Jurisdiction over Validity of an Arbitration Agreement between Foreign Parties

#### I-A. England

##### I-A-1. The Case of *Atlantic Emperor*: Fact

Under the seat theory, the court is involved with arbitration if the place of arbitration is in that country. If the validity or existence of the arbitration agreement is disputed as a preliminary issue, the basis of the seat itself is vulnerable. Then, in the case of international arbitration, jurisdiction must be determined on the basis not of the seat but on ordinary rules of international jurisdiction in that country.

In England, matters relating to an arbitration agreement are classified as actions in personam, which are designed to settle the rights of the parties as between themselves. Most cases of actions in personam are regulated by the Civil Jurisdiction and Judgements Act 1982, which was an enactment based on the 1968 Brussels Convention. It does not cover cases of arbitration. Article 1(4) provides that the Convention shall not apply to arbitration. However, if the case concerns whether or not there is an arbitration agreement as a preliminary issue, the scope of the term "arbitration" in Article 1(4) comes into question.

In the case of *Marc Rich and Co. AG v. Societa Italiana Impianti PA* (hereinafter referred to as the *Atlantic Emperor*<sup>1</sup>, and the case on this issue in the European Court of Justice is referred to as the *Marc Rich* case<sup>2</sup>), the issue arose whether the term 'arbitration' in Article 1(4) of the 1968 Brussels Convention covered the question of the existence or validity of an arbitration agreement between foreign parties.

This issue is significant not only for interpretation of the 1968 Brussels Convention but also for practice among those who engaged in arbitration, because this preliminary issue decides whether or not the rules on arbitration are applied in each country. Internationally clear criteria on this issue are highly desirable. One possible solution in Europe and unified criteria will be suggested from comparative point of view in this chapter.

In the *Atlantic Emperor*, the dispute arose from a contract for the sale of Iranian crude oil from the Italian defendants "Impianti" to the Swiss plaintiffs "Mark Rich." After they concluded the contract on 26th January 1987, the plaintiffs sent a telex setting out the terms including an arbitration clause for the first time. However, there was no reply from the defendants. After the defendants nominated the "Atlantic Emperor" to load under the contract, the vessel completed loading on 6th February 1987, but the plaintiffs alleged that the cargo was seriously contaminated on that day, and claimed damages in excess of \$7,000,000.

On 18th February 1988, the defendants denied liability and issued a writ in Italy to that effect. On 29th February, the plaintiffs commenced arbitration in London. Since the defendants did not appoint an arbitrator, the plaintiffs issued an originating summons asking the Commercial Court in London to appoint an arbitrator on the behalf of the defendants, and obtained leave to serve the summons

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<sup>1</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA (the Atlantic Emperor)* [1989] 1 Lloyd's Rep 548; *Marc Rich and Co. AG v. Societa Italiana Impianti PA (the Atlantic Emperor, No. 2)*. [1992] 1 Lloyd's Rep. 624.

<sup>2</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855.

out of the jurisdiction in England. On 8th July 1988, the defendants applied to the Commercial Court to set aside the leave. They argued that the contract did not contain an arbitration agreement and the dispute should be resolved in Italy since it fell within the scope of the 1968 Brussels Convention.

The point in the dispute was whether or not, the exclusion term "arbitration" in the Article 1(4) of the 1968 Brussels Convention covered an aspect of the existence or validity of an arbitration agreement.

The plaintiffs argued that the exclusion expressed in the widest form by use of the simple single word "arbitration" covered all aspects connected with arbitration, including matters such as the existence or validity of an arbitration agreement. On the other hand, the defendant stated that the exclusion did not extend to a case where the principal issue was whether or not there ever was a binding arbitration agreement.<sup>3</sup>

On 3rd November 1988, Mr. Justice Hirst in the Commercial Court in London concluded that the 1968 Brussels Convention did not apply, and that the putative proper law of the contract was English, having regard to the terms of the disputed arbitration clause. The defendants appealed. On 26th January 1989, the Court of Appeal decided that the question of interpretation of Article 1(4) of the Brussels Convention was necessary to enable judgement to be given, and that the question would be referred to the European Court by virtue of Article 2(2) of the 1971 International Protocol.<sup>4</sup> The most significant question was whether or not the exception in Article 1(4) of the Convention extended to litigation or judgements where the initial existence of an arbitration agreement was in issue.

On 25th July 1991, the European Court did not in the end give a clear determination as to whether or not, the exclusion term "arbitration" included the issue relating to the existence or validity of the arbitration agreement. Instead, the Court stated that in order to determine whether a dispute fell within the scope of the Convention, reference must be made solely to the subject-matter of the dispute.<sup>5</sup> Since the subject-matter of this case was the appointment of an arbitrator, the Court decided that the dispute fell outside the scope of the Convention and therefore the fact that a preliminary issue related to the existence or validity of the arbitration agreement did not affect the exclusion from the Convention.

On 19th December 1991, the Court of Appeal in England concluded that the

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<sup>3</sup> *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548 at 550.

<sup>4</sup> The Court of Appeal, sitting in an appellate capacity, is required to refer questions of interpretation to the European Court if it considers that a decision of the European Court on that question is necessary to enable it to give judgement.

<sup>5</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855 at 3902.

plaintiffs had submitted to the jurisdiction of the Italian court and dismissed the appeal.<sup>6</sup>

## I-A-2. Judgement of the European Court

### I-A-2-a. “Negative Interpretation”

#### (1) Definition of the Negative Interpretation

On 25th July 1991, the European Court decided as follows:

"In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute...

The fact that a preliminary issue relates to the existence or validity of the arbitration does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator...

Consequently, the reply must be that Article 1(4) of the Brussels Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation."<sup>7</sup>

They are difficult sentences to understand, as Lord Justice Neill conceded in the Court of Appeal in England by stating that "I have not found these last paragraphs easy to interpret."<sup>8</sup> Other commentators agree that the precise scope of the exclusion of arbitration in the 1968 Brussels Convention is still not clear.<sup>9</sup> Thus, “negative interpretation” understands that the European Court did not answer the question as to whether the term ‘arbitration’ in the Article 1(4) of the 1968 Brussels Convention covered an aspect of the existence or validity of an arbitration agreement.

#### (2) Interpretations in Various Cases

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<sup>6</sup> *The Atlantic Emperor*, No. 2. [1992] 1 Lloyd's Rep. 624 at 625.

<sup>7</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855 at 3902-3903.

<sup>8</sup> *The Atlantic Emperor*, No. 2. [1992] 1 Lloyd's Rep. 624 at 628.

<sup>9</sup> Beaumont, Paul R. Anton & Beaumont's Civil Jurisdiction in Scotland, 2nd ed. Edinburgh: W. Green/Sweet & Maxwell, 1995: p.61.

In the case of the *Heidelberg*,<sup>10</sup> Judge Diamond QC commented on the above judgement that it was not necessary to decide whether a dispute as to the existence or validity of an arbitration agreement was within or outside the 1968 Brussels Convention.<sup>11</sup> However, Diamond QC stated: “I feel the force of the arguments that exception (4) of the Brussels Convention should not apply to judgements as to the validity of arbitration agreements both because such judgements are not confined to “arbitration” but necessarily extended to the construction of the underlying contract between the parties, but also and principally because there are solid practical and policy reasons why the judgement of the first Contracting State to pronounce on the validity or invalidity of the arbitration agreement should be recognised in the other Contracting States.”

Following Article 21 of the 1968 Brussels Convention, the court first seized of the case on the existence or validity of an arbitration agreement shall have jurisdiction. In the case of the *Heidelberg*, the Tribunal de Commerce in France which first decided the invalidity of an arbitration clause was in practice not the court first seized. However, in the *Heidelberg*, Judge Diamond stated that it was not permissible to investigate this matter after the judgement was issued.<sup>12</sup>

A usual course is that a party starts litigation, and then another party requests a stay from that court on the grounds of an arbitration agreement, or asks for injunction in the court of the country which the arbitration agreement designates as the seat of arbitration as in the *Atlantic Emperor*. In the latter case, the court first seized on the existence or validity of an arbitration agreement may be the court of the country which is being asked for the injunction rather than the court which started the litigation, as the principal claim of the litigation is not on the existence or validity of an arbitration agreement. If the subject matter of an ancillary claim itself falls within the scope of the 1968 Brussels Convention, it falls within the Convention whether or not the subject matter of the principal claim falls in the Convention.<sup>13</sup> Thus, there is no link between the treatment of ancillary claims and principal claims.<sup>14</sup> In line with the decision in the *Heidelberg*, to guarantee jurisdiction, the party must bring the claim regarding the existence or validity of an arbitration agreement when the party starts litigation on the principal claim.

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<sup>10</sup> The *Heidelberg*. [1994] 2 Lloyd's Rep. 287.

<sup>11</sup> Id., at 299.

<sup>12</sup> Id., at 297.

<sup>13</sup> *Luise de Cavel v. Jacques de Cavel*. Case 120/79 [1980] ECR 731 at 732.

<sup>14</sup> Hascher, Dominique T. "Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention." *Arbitration International*. Vol. 13, No. 1: p. 33 at 56-57.

In *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* (hereinafter referred to as the *PASI* case),<sup>15</sup> the High Court decided that the *Marc Rich* case did not answer the question as to whether the term 'arbitration' in the Article 1(4) of the 1968 Brussels Convention covered an aspect of the existence or validity of an arbitration agreement.<sup>16</sup>

In *Alfred C Toepfer International GmbH v. Société Cargill France*,<sup>17</sup> the Court of Appeal stated that "the European Court left undecided whether a free-standing dispute as to the existence or validity of an arbitration clause falls within the Article 1(4) of the Brussels Convention."<sup>18</sup>

What is clear so far is that the issue of the appointment of an arbitrator is included in the exclusion term "arbitration" and therefore excluded from the 1968 Brussels Convention. However, the judgement gave no guidance in those cases where the issue of the existence or validity of an arbitration agreement stood alone.<sup>19</sup>

Clearly, the issue of the existence or validity of an arbitration agreement has been tied in with the related question of the appointment of an arbitrator, which falls outside of the 1968 Brussels Convention. To the extent that the plaintiffs ask the English court to appoint an arbitrator, which is the most reasonable procedure for the plaintiffs when the other party does not respond to it, the most significant issue may not be clearly decided in the European Court.

The circumstance in which the European Court may decide this most significant issue is, for example, as in the case of the *Atlantic Emperor*, when the plaintiff has asked the English court to confirm the existence or validity of an arbitration agreement instead of asking for an arbitrator to be appointed on behalf of the defendant. Since the Italian Court had already ruled that the defendants were not liable before the English court was involved, the defendant raised an objection against the jurisdiction to the English court based on Article 2 or 21 of the 1968 Brussels Convention.<sup>20</sup> In such circumstances, if the question is referred to the

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<sup>15</sup> *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* [1996] Times, 22nd July 1996; UK Legal Lexis Current Awareness, Halsbury's Laws of England-Monthly Review.

<sup>16</sup> Hascher, Dominique T. "Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention." *Arbitration International*. Vol. 13, No. 1: p. 33 at 50.

<sup>17</sup> *Alfred C Toepfer International GmbH v. Société Cargill France*. [1998] CLC 198; [1998] 1 Lloyd's Rep. 379.

<sup>18</sup> *Id.*, [1988] CLC 198 at 208.

<sup>19</sup> *The Atlantic Emperor*, No. 2. [1992] 1 Lloyd's Rep. 624 at 628.

<sup>20</sup> Article 2 provides that subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state. Article 21 provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion decline jurisdiction in favour of that court.



European Court, it may be called upon to determine whether the exclusion term "arbitration" includes the issue of the existence or validity of an arbitration agreement.

### I-A-2-b. "Positive Interpretation"

#### (1) Definition of the Positive Interpretation

Whether or not, the European Court was correct in tying the issue of the existence or validity of the arbitration agreement to the question of the appointment of an arbitrator, it is impossible to separate these two issues. Without a valid arbitration agreement, it is impossible to appoint an arbitrator. Therefore, if the question of the appointment of an arbitrator falls outside the 1968 Brussels Convention, the issue of the existence or validity of an arbitration agreement should also fall outside the Convention.<sup>21</sup> The "positive interpretation" of the case is that the European Court decided that the issue of the existence or validity of an arbitration agreement was excluded from the 1968 Brussels Convention in the *Marc Rich* case.

In his opinion to the European Court, Advocate General Darmon also supported the broad interpretation of what was meant by the word "arbitration" and therefore excluded the issue of the existence or validity of an arbitration agreement from the 1968 Brussels Convention.<sup>22</sup>

The European Court in the *Marc Rich* case stated that matters relating to arbitration were generally excluded from the 1968 Brussels Convention for the reason that:

"The international agreements, and in particular the 1958 New York Convention, lay down rules which must be respected not only by the arbitrators themselves but by the courts of the Contracting states. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the 1968 Brussels Convention on the ground that it was already covered by international conventions, the Contracting

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<sup>21</sup> Briggs, Adrian. "The Brussels Convention." Yearbook of European Law. Vol. 11, 1991:p. 527 at 528.

<sup>22</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855 at 3876.

Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts."<sup>23</sup>

The court thus followed Jenard's 1968 Commentary on the Convention in its reasoning as to why arbitration is excluded by the 1968 Brussels Convention.<sup>24</sup>

Arbitration has gained a special position in the world. At a national level, the interpretation of the classification of an arbitration agreement divides into several theories such as of contractual, procedural, mixture, or sui generis.<sup>25</sup> This controversy was the reason why matters relating to arbitration were excluded from the EEC Convention on the Law Applicable to Contractual Obligations of 1980 (hereinafter referred to as the 1980 Rome Convention). The UK, which basically regards an arbitration agreement as an ordinary contract, proposed that arbitration agreement should not be excluded from the 1980 Rome Convention. On the other hand, civil law countries insisted upon excluding matters relating to arbitration from the Convention.

At the international level, the 1958 New York Convention and the UNCITRAL Model Law are regarded as successful examples of unification of law.<sup>26</sup> On both the domestic and international level, arbitration has gained a special position, and special legislation has been established. Thus, the positive interpretation of the judgement of European Court in *the Marc Rich* case should be followed. That is, matters relating to the existence or validity of an arbitration agreement should be excluded from the 1968 Brussels Convention.

In the *Atlantic Emperor*, after all, the English court followed this view and concluded that the judgement of the European Court did not provide any clear authority for recognising the jurisdiction of the Italian court.<sup>27</sup> This view is consistent with the decision in the case of *Offer SpA v. Hans-Joachim Kantner*<sup>28</sup> in the

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<sup>23</sup> Id., at 3900-3901.

<sup>24</sup> "Report by Mr. P. Jenard on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters." Official Journal of the European Communities, Vol. 22, 1979: C59/1 at 13.

<sup>25</sup> Briefly, the contractual theory regards an arbitration agreement as a contract under substantive law; the procedural theory as under procedural law; the mixture theory regards it as having both characteristics of the above two theories; and the sui generis theory regards it as an original contract.

<sup>26</sup> As of July 1997, 112 countries have made access to the 1958 New York Convention ("New York Convention of 1958 List of Contracting States." Yearbook of Commercial Arbitration, Vol. XXII, 1997: p. 588). In terms of the UNCITRAL Model Law, British Columbia in Canada first enacted legislation on arbitration based on it in May 1986. Since then, Australia, Bulgaria, Canada, Cyprus, Hong-Kong, Nigeria, Russia and Scotland have enacted based on it. Furthermore, all the major permanent arbitral institutions have a guide book to the UNCITRAL Model Law. For example, the LCIA has a Bulletin, "A Users Guide to LCIA and UNCITRAL Administered Arbitrations."

<sup>27</sup> *The Atlantic Emperor*, No. 2. [1992] 1 Lloyd's Rep. 624.

<sup>28</sup> *Effer SpA v. Hans-Joachim Kantner*. Case 38/81 [1982] ECR 825.

European Court. In this case, the issue was, in short, whether or not, the term "contract" includes the issue of existence of the contract. The European Court decided that the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself.<sup>29</sup>

## (2) A Logical Interpretation by Analogy with Decision in the *Van Uden* Case

In *Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another* (hereinafter referred to as the *Van Uden* case),<sup>30</sup> the European Court decided that provisional measures are not ancillary to arbitration proceedings: "where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, that Convention is applicable."<sup>31</sup> In this case, the Court quoted from the Report on the Convention of 9th October 1978: "the Convention does not apply to judgements determining whether an arbitration agreement is valid or not."<sup>32</sup> However, this was merely one of factors argued in the *Marc Rich* case by the European Court. The important issue remained unanswered: whether or not the issue of the existence or validity of an arbitration agreement falls within the scope of the 1968 Brussels Convention.

The *Van Uden* case does, however, suggest a possible logical interpretation to determine the scope of the 1968 Brussels Convention with regard to this issue, in line with the decision in *Mario Reichert and Others v. Dresdner Bank AG*.<sup>33</sup> In the *Van Uden* case, the European Court stated that provisional measures were not ancillary to arbitration proceedings, but ordered in parallel to such proceedings for the protection of a variety of rights. The scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.<sup>34</sup> This nature of the rights which they serve to protect is the subject-matter of the issue.<sup>35</sup> In the

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<sup>29</sup> Id., at 834.

<sup>30</sup> *Van Uden Maritime BV, Trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another*. Case-391/95 of the European Court decided on 17th November 1998.

<sup>31</sup> Id., the Court's Answer to the Question 3.

<sup>32</sup> "Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice." Official Journal of the European Communities. Vol. 22, 1979: C59/71.

<sup>33</sup> *Mario Reichert and Others v. Dresdner Bank AG*. Case C-261/90 [1992] ECR I-2149.

<sup>34</sup> *Van Uden* case. Case-391/95 of the European Court decided on 17th November 1998 at paragraph 33; also *Mario Reichert and Others v. Dresdner Bank AG*. Id. at 2184.

<sup>35</sup> *Van Uden* case. Case-391/95 of the European Court decided on 17th November 1998 at the Court's

*Mark Rich* case, the European Court also stated that in order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. There seems to be one possible logical analogy, although the issue of provisional measures and issue of the validity of an arbitration agreement are not exactly the same.

By analogy with the reasoning in the *Van Uden* case, in so far as the existence or validity of an arbitration agreement, not other agreements or contracts, is the issue, the subject matter is the rights which an arbitration agreement serves to protect. As mentioned above, in terms of jurisdiction, the treatment of principal claims and that of ancillary claims are independent. Therefore, if the rights which provisional measures as the principal claim serve to protect are considered in order to determine the jurisdiction, the rights which the existence or validity of an arbitration agreement as principal or ancillary claim serves to protect should be also considered.

Under the common law, which regards an arbitration agreement as an ordinary contract, the right in question can be identified as the right to submit disputes to arbitration.<sup>36</sup>

In civil law system, the procedural theory would suggest that an arbitration agreement serves to realise the rights and obligations under the main substantive contract. An arbitration agreement simply functions as the basis to realise these rights and obligations. However, it is necessary to distinguish between the establishment of an arbitration agreement and its legal consequences. The consequences are obviously procedural. However, there is a substantive element in the establishment of the agreement, irrespective of whether it is under substantive law or procedural law: whether an agreement to refer disputes to arbitration was formed or not. The mixture theory seems to follow this view. It focuses upon the characteristics of contract under substantive law at the moment of conclusion of the agreements; and then upon the characteristics of the contract in terms of procedural law for the duration of the arbitral proceedings.

The subject matter of the existence or validity of an arbitration agreement is

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Answer to the Question 3.

<sup>36</sup> "Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgement in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice." Official Journal of the European Communities. Vol. 22, 1979: C59/93, Commentary 63.

Commentary 63 provides that the 1968 Brussels Convention in no way restricts the freedom of the parties to submit disputes to arbitration. Thus, the rights which an arbitration agreement serves to protect is the right to submit disputes to arbitration.

thus the right to submit disputes directly to arbitration. Therefore, if the nature of the rights which an arbitration agreement serves to realise is considered in order to determine the scope of the 1968 Brussels Convention, it is the right to submit disputes to arbitration. It is obviously included in the term "arbitration" and should be excluded from the 1968 Brussels Convention.

Whether such rhetorical reasoning is used, it seems that the positive interpretation of the decision of the *Marc Rich* case has been accepted in the European Court.<sup>37</sup> After a long complicated dispute involving the English, Italian and European courts, if the English court has decided that there was no valid arbitration agreement, the Italian court may have sole jurisdiction. "No other court will ask the European Court about it in the future and it could properly be left unanswered."<sup>38</sup>

## I-A-3. Determination of Jurisdiction in the English Court

### I-A-3-a. Putative Proper Law of Contract

In the *Atlantic Emperor*, there was a conflict between the jurisdiction of the English court and of the Italian court. At issue in English proceedings was the determination of its jurisdiction. In contrast, the Italian proceedings founded upon the merits of the oil contract claim involving Italian party.<sup>39</sup>

It seems that the conflict arose because of the need to determine jurisdiction in the English court. In this connection, on 3rd November 1988, Mr. Justice Hirst, first, decided that the 1968 Brussels Convention did not apply to the case, and consequently the Italian court did not have exclusive jurisdiction. Secondly, Hirst concluded that the English court could have jurisdiction because the putative proper law of the contract was English law, and therefore it was possible to issue leave for service out of the jurisdiction.

The putative proper law of the contract was decided by the principle enunciated in *Dicey & Morris on the Conflict of Laws*: "The formation of a contract is governed by the law which would be the proper law of the contract if the contract was validly concluded."<sup>40</sup> Since the main substantive contract was obviously

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<sup>37</sup> Hascher, Dominique T. "Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention." *Arbitration International*. Vol. 13, No. 1: p. 33 at 39.

<sup>38</sup> Briggs, Adrian. "The Brussels Convention." *Yearbook of European Law*. Vol. 11, 1991: p. 527 at 528-530.

<sup>39</sup> Kaye, Peter. "The EEC and Arbitration: the Unsettled Wake of the Atlantic Emperor." *Arbitration International*. Vol. 9, No. 1, 1993: p. 27 at 53.

<sup>40</sup> Collins, Lawrence ed. *Dicey and Morris on the Conflict of Laws*, 12th ed. London: Sweet & Maxwell, 1993: p. 1190.

concluded, the English court decided that the putative proper law of the contract should be English law, having regard to the terms of the disputed arbitration clause.

There seem to be two arguable points in the application of the putative proper law of the contract. First, theoretically, the rules formulated by *Dicey & Morris on the Conflict of Laws* are obviously domestic rules on conflict of laws in England; and therefore it is arguable whether this should be applied when the jurisdiction of the English court is not settled. However, this has been widely accepted in courts in the UK and the European Court. In the case of *Bank of Scotland v. Seitz*,<sup>41</sup> the Outer House decided in terms of its jurisdiction that the place of performance of contractual obligation was decided by the Scottish rules of conflict of laws as *lex fori*.<sup>42</sup> This decision was based on the case of *Industrie Tessili Italiana Como v. Dunlop AG*<sup>43</sup> in the European Court, which stated that the place of performance of contractual obligation may be determined by substantive law inferred from the private international law of the court before which the matter was brought.<sup>44</sup>

In the case of *Shevill v. Presse Alliance*,<sup>45</sup> the European Court stated, in relation to jurisdiction based on the place of a harmful event, that the criteria for assessing whether the event in question was harmful, and the evidence required of the existence and extent of the harm alleged by the victim, were not governed by the 1968 Brussels Convention. It applied instead the substantive law as determined by the national conflict of laws rules of the court seized of jurisdiction.<sup>46</sup>

### I-A-3-b. Disputed Basis of the Putative Proper Law of Contract

The second arguable point in the application of the putative proper law of the contract is that the basis to determine the putative proper law of contract was the arbitration clause. However, the existence or validity of the arbitration clause itself had been disputed. It was perhaps inevitable that Mr. Justice Hirst should conclude that the putative proper law of the contract was English law when there was a telex providing that the contract should be governed by English law and disputes should be settled in London. There was *prima facie* an arguable case for the English court.

English law simply regards an arbitration agreement as an ordinary contract. The court need not therefore give special attention to the arbitration agreement. On the other hand, in some countries including Italy, an arbitration agreement is

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<sup>41</sup> *Bank of Scotland v. Seitz (O.H.)*. 1989 S.L.T. 641.

<sup>42</sup> *Id.*, at 641-642.

<sup>43</sup> *Industrie Tessili Italiana Como v. Dunlop AG*. Case 12/76 [1976] ECR. 1473.

<sup>44</sup> *Id.*, at 1478.

<sup>45</sup> *Shevill v. Presse Alliance*. [1996] AC 977; 3 All ER 929 (H.L.).

<sup>46</sup> *Id.*, 3 All ER 929 (H.L.) at 929.

regarded as a special agreement different from an ordinary contract; and particular conditions such as a written agreement are required, in accordance with Article II of the 1958 New York Convention.

On the second arguable point, Mr. Justice Hirst quoted the statement in *the Parouth*<sup>47</sup> that it was wrong to treat an arbitration clause as neutral when the arbitration agreement was disputed, because it had the important function of indicating the proper law of this dispute.<sup>48</sup>

## I-A-4. Under the Common Law

### I-A-4-a. Service of Writ

As mentioned above, the English court decided in the *Atlantic Emperor* that the 1968 Brussels Convention did not apply to the case, and consequently the Italian court did not have exclusive jurisdiction. Then, it is largely the common law which must be applied to determine the jurisdiction on the preliminary issues of existence or validity of an arbitration agreement between foreign parties. The most distinctive characteristic of the common law is that anyone can invoke jurisdiction, provided only that the defendant has been served with a writ of summons.

Under the common law, basically, jurisdiction depends upon the presence of the defendant in England, to whom service must be made personally, by post, or by inserting a copy of the writ through the defendant's letter box.<sup>49</sup> Once the court has asserted its power by service, it is competent despite the defendant's subsequent departure from the country. There is no jurisdictional distinction between presence and residence in England. In the case of *Baroda v. Wildenstein*,<sup>50</sup> service was successfully made on a world-famous French art expert who visited England only for the Ascot races.<sup>51</sup> Similarly, jurisdiction as regards a company also depends upon its presence in England.<sup>52</sup>

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<sup>47</sup> *The Parouth* (C.A.) [1987] 2 Lloyd's Rep. 351 at 353.

<sup>48</sup> *The Atlantic Emperor*. [1989] 1 Lloyd's Rep 548 at 552.

<sup>49</sup> North, P. M. and Fawcett, J. J. ed. *Cheshire and North: Private International Law*, 11th ed. London: Butterworths, 1987: p. 186.

<sup>50</sup> *HRH Maharanee Seethaderi Gaekwar of Baroda v. Wildenstein*. [1972] 2 QB 283.

<sup>51</sup> It does not seem that this precedent confirms the power to make service on a temporal foreign visitor to England, because there were several conditions in favour of recognition of English jurisdiction in this case. First, the defendant was connected with art dealer companies in London. Secondly, the defendant did not satisfy the court that English trial would be oppressive of him. Thirdly, the issue whether or not, the painting was a genuine Boucher was supra-national in character.

<sup>52</sup> A company registered in England under Section 725-1 of the Company Act 1985 is regarded as present in England; and service of a writ can be effected by sending it to the registered office of the company.

In the case of a foreign company with a place of business in England, Section 691 of the

Even if the defendant is abroad, it is also possible for him to submit to English jurisdiction by the defendant acknowledging service before actual service of the writ, or instructing a solicitor to accept service on his behalf. It is also possible for foreign parties to agree to submit any dispute arising between them including arbitration to English jurisdiction.

It is unlikely that English courts would accept an implied agreement to submit. In *Vogel v. R. and A Kohnstamm Ltd.*, Ashworth J. stated that an implied agreement to assent to the jurisdiction of a foreign tribunal was not something which courts of this country had entertained as a legal possibility.<sup>53</sup>

#### I-A-4-b. Service of Writ out of the Jurisdiction

In the case of the preliminary issue of the existence or validity of an arbitration agreement between foreign parties who reside abroad, traditionally, under the common law, no action was made against a defendant unless he or she had been served with a writ while present in England. To prevent abuse of this principle, so-called "assumed jurisdiction" was introduced by the Common Law Procedure Act 1852, which gave the courts discretion to summon absent defendants, whether English or foreign. This rule is now generally provided by Order 11 of the Rules of the Supreme Court (RSC).

In cases of arbitration, Section 8 of the Order 73 of the RSC provides for service out of the jurisdiction. For example, service out of the jurisdiction is permissible with the leave of Court if the applicant seeks some remedy or relief, or requires a question to be determined by the Court, affecting an arbitration, an arbitration agreement or an arbitral award.

The UK is a party to the Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters signed at the Hague on 15th November 1965 (hereinafter referred to as the 1965 Hague Convention on Service

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Companies Act 1985 obliges a foreign company to file with the register of companies the names and addresses of one or more persons authorised to accept services of process on its behalf. The service should be made by leaving a writ at or sending it by post to the place of business under Section 691 of the Companies Act 1985. However, unless a foreign company is practically carrying on business at a place within the jurisdiction, it can not be served with the process within the jurisdiction (*The Theodoros* [1977] 2 Lloyd's Rep 428).

Before the Oversea Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992 were established, it was not necessary to prove any link between the subject matter of the proceedings and business being carried on at its branch. However, after this Regulations were enacted, conditions have been slightly changed. If place of business is in Great Britain, the condition is the same. If a company has a branch in Great Britain, it can be only served on the ground that the cause of action is related to the business being carried on at its branch (*Saab and Another v. Saudi American Bank* [1999] Times 29th July 1999, p. 26).

<sup>53</sup> *Vogel v. R. and A Kohnstamm Ltd.* [1973] QB 133.



Abroad).<sup>54</sup> English documents may be served in another contracting state either through the central authority, judicial authority, or through the British consular authority in that country.<sup>55</sup>

Thus, jurisdiction is eventually determined as a matter of procedure in England, although some connection with England is necessary. It seems that the principle of *forum non conveniens* has been developed in England because of this gap between the connection with England and the procedure of service of a writ. Under this principle, courts which are legally competent to try the case can refuse trial even if they regard it as appropriate. In *Spiliada Maritime Corporation v. Cansulex Ltd.*,<sup>56</sup> the House of Lord stated that, under the principle of *forum non conveniens*, the court had to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice, considering the relevant factors, including the advantage of efficacy, expedition and economy in bringing the action in England.

If a disputed arbitration agreement between foreign parties indicates England as the seat of arbitration, this must be sufficient connection for service out of the jurisdiction. It seems that, in the case of the *Atlantic Emperor*, the principle of *forum non conveniens* was not considered.

## I-B. Japan

If one of the foreign parties with no residence and business place in Japan asks the Japanese court to examine the preliminary issue of the existence or validity of an arbitration agreement, does the Japanese court have jurisdiction?

In the *Atlantic Emperor*, the English court recognised the jurisdiction on the basis that the disputed arbitration agreement indicated England as the seat of arbitration.

Needless to say, if the other foreign party responds to the Japanese court, the Japanese court has jurisdiction on the basis of the agreement on jurisdiction. However, if the other foreign party does not seek jurisdiction of the Japanese court,

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<sup>54</sup> The 1965 Hague Convention on the Service Abroad covers topics of the service of process abroad and the matters of obtaining evidence abroad. It is a revised and improved version of articles 1 to 7 of the Convention on the Civil Procedure in Hague, 1954.

<sup>55</sup> A plaintiff must lodge a request for service to the court with two copies of the writ or summons and a certified translation in the official language of the country in question. The court forwards the documents to the Foreign Office. After the service, the plaintiff will receive an official certificate of service. (Sime, Stuart. *A Practical Approach to Civil Procedure*, 2nd ed. London: Blackstone Press Limited, 1995: pp. 129-130).

<sup>56</sup> *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460 (H.L.).

the Japanese court must, first of all, determine its jurisdiction. Even if the issue is appointment of arbitrator on behalf of the other foreign party as in *the Atlantic Emperor*, a necessary condition for the co-operation of the Japanese court to appoint an arbitrator on behalf of the other foreign party is that the Japanese court has jurisdiction.<sup>57</sup>

Unlike common law rules on international jurisdiction where the courts can have jurisdiction if service out of the jurisdiction is made, Japanese rules on international jurisdiction are not flexible at all. In so far as following traditional Japanese rules on international jurisdiction, the Japanese court is unlikely to recognise its jurisdiction over cases between foreign parties, because the strongest factor in deciding jurisdiction in Japan is territorial connection especially of the defendant. In the above case, the defendant is not located in Japan.

A possible analogy of territorial jurisdiction is that Japan would have been designated as the seat of arbitration in the disputed arbitration agreement, which may mean that the place of performance of the contract, that is, arbitration, is in Japan. However, the place of performance must be clearly indicated.<sup>58</sup> Since the existence or validity of an arbitration agreement is disputed, it is difficult to consider that the place of performance is clearly indicated in this case. Furthermore, it is arguable whether or not the Japanese courts should recognise jurisdiction simply because the place of performance of obligation is in Japan, as mentioned in the previous chapter.

There are also some other possible connections with Japan. For example, the law applicable to the main contract and the arbitration agreement may be the Japanese law. However, such factors are not persuasive to decide in favour of jurisdiction in Japan, unless the theory of the balance of jurisdiction in international procedures, considering justice, fairness, and expediency of the trial (*kankatsu haibun-setsu*)<sup>59</sup> is positively accepted, and the Japanese court determine its jurisdiction with flexibility, considering various connections with Japan.

As mentioned in the previous chapter, in *Sai-han* S56.10.16,<sup>60</sup> the Supreme Court first applied rules of domestic territorial jurisdiction, and then granted jurisdiction from the viewpoint of international procedure. It was a traditional view of international jurisdiction in Japan, but the Supreme Court added that it was

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<sup>57</sup> *Tokyo-chi-han* S33.1.25. (*Ka-min-shū*, Vol. 9, p.111) (Tokyo District Court's Judgement on 25th January 1958).

<sup>58</sup> Ikehara, Suetō. "Kokusai-teki-saiban-kankatsu-ken." *Shin Jitsumu-minji-soshō-kōza* Vol. 7. Chūichi Suzuki and Akira Mikazuki ed. Tokyo: Nihon-hyōron-sha, 1982: p. 3 at 26-28.

<sup>59</sup> *Sai-han* S39.3.25. (*Min-shū*, Vol. 18, No. 3, p. 486) (Supreme Court's Judgement on 25th March 1964).

<sup>60</sup> *Sai-han* S56.10.16. (*Min-shū*, Vol. 35, No. 7, p. 1224) (Supreme Court's Judgement on 16th October 1981).

difficult to deny jurisdiction in Japan when there were several connections with Japan, irrespective of the rules of domestic territorial jurisdiction.

Professor Kobayashi stated that issue on international jurisdiction is on a different level from that on domestic territorial jurisdiction. Under domestic jurisdiction, cases can be transferred to other domestic jurisdictions even if one jurisdiction is denied. However, under international jurisdiction, other foreign jurisdiction can not be guaranteed, if one jurisdiction is denied. This related to the fundamental right of having jurisdiction in an international level. Not only procedure and language but also legal system and culture are different in each jurisdiction.<sup>61</sup> Thus, rules on international jurisdiction should be understood, being not so influenced by domestic territorial jurisdiction. Japanese jurisdiction should simply be recognised if there is either personal or material connection with Japan in the case.<sup>62</sup>

For a meantime, it may be difficult for the Japanese court to recognise jurisdiction over the preliminary issue of the existence or validity of an arbitration agreement between foreign parties without residence or business place in Japan, unless jurisdiction in Japan is agreed by the parties.

## I-C. Russia

Under the USSR regime, jurisdiction of the FTAC and AC had, in practice, been coincided with that of the courts. The ordinary courts usually did not become involved in international litigation. Therefore, questions connected with the application of international private law to commercial transactions have usually arisen in the course of international arbitration proceedings.<sup>63</sup> As a result, the problem of jurisdiction had to be understood as an issue of competence of the FTAC and AC. Since the principle of *Kompetenz-Kompetenz*<sup>64</sup> has been recognised in the FTAC and AC, they may be able to examine the validity of an arbitration agreement between foreign parties as long as there is a written agreement concerning the reference of dispute settlement to the FTAC or AC, even if one of the parties disputes the existence of the arbitration agreement.

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<sup>61</sup> Kobayashi, Hideyuki. "Kokusai-saiban-kankatsu." Jurisuto Zōkan Minji-soshō-hō no Sōten. Yoshimitsu Aoyama and Makoto Itō. ed. Tokyo: Yūhikaku, 1998: p. 272.

<sup>62</sup> Ishiguro, Kazunori. Kokusai-minji-funsō-shori no shinsō. Tokyo: Kabushiki-gaisha Nihon-hyōron-sha, 1992: p. 23.

<sup>63</sup> Komarov, Alexander S. "The UNIDROIT Principles of International Commercial Contracts: a Russian View." Uniform Law Review. Vol. 1, 1996: p. 252.

<sup>64</sup> It is unanimously agreed that the arbitration tribunal has power to rule on its own jurisdiction, or competence to decide upon its own competence. This principle is generally recognised on the Continent as *Kompetenz-Kompetenz*.

In *Sojuznefteexport v. JOC Oil*<sup>65</sup> in 1984, the FTAC recognised its jurisdiction over preliminary issues, although it was the case involving Soviet parties. It stated that an arbitration agreement can be recognised as invalid only in the case where there were defects in will (mistake, fraud and so on), or breach of the requirements of the law relating to the content and the form of an arbitration.<sup>66</sup> Factors pointing to the initial non-existence of an arbitration agreement are divided between matters on formation and on mistake or illegality in will.<sup>67</sup>

Recently, there has been a slight confusion as regards jurisdiction over arbitration in Russia. Courts and arbitrazh courts currently coexist under the RF. The arbitrazh court (*арбитражный суд*) is a state judicial organisation and must be distinguished from the ICAC (*международный коммерческий арбитраж*), an independent permanent arbitral institution.

Article 22-6 of the Arbitrazh Procedure Code enacted on 5th April 1995 (hereinafter referred to as the 1995 Arbitrazh PC)<sup>68</sup> provides that the arbitrazh court has power to consider cases of organisations and citizens of the RF and also foreign organisations, organisations with foreign investments, international organisations, foreign citizens, persons without nationality engaging in entrepreneurial activity, unless other rules are regulated by international treaties of the RF. Recently, almost all commercial disputes involving foreign parties have fallen to the jurisdiction of the arbitrazh courts.<sup>69</sup>

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<sup>65</sup> *Sojuznefteexport v. JOC Oil*. Yearbook: Commercial Arbitration. Vol. 18, 1993: p. 92.

<sup>66</sup> *Id.*, at 98.

<sup>67</sup> Gardner, Anthony. "The Doctrine of Separability in Soviet Arbitration Law: An Analysis of *Sojuznefteexport v. JOC Oil Co.*" Columbia Journal of Transnational Law. Vol. 28, 1990: p. 301 at 327.

<sup>68</sup> Originally, arbitrazh court heard disputes between state organisations. However, recently, as the private-sector economy rapidly expanded, a debate arose about the proper fate of the state arbitrazh court. Some argued that the arbitrazh court should be eliminated. Others insisted on importance of arbitrazh court as the only institution with experience in settling large industrial disputes. In the end, this debate was resolved in favour of the latter, when the Law on the Arbitrazh Court was established on 4th July 1991. In accordance with it, the Arbitrazh Procedure Code of the RF was adopted on 5th March 1992 (hereinafter referred to as the 1992 Arbitrazh PC).

However, the 1992 Arbitrazh PC soon proved inadequate (see, Hendley, Kathryn. "Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts." American Journal of Comparative Law. Vol. 46, No. 1, 1998: p. 93 at 94-95). A new form and jurisdiction of the arbitrazh court were defined by the Federal Constitutional Law on Arbitrazh Courts in the RF (Vedomosti Federal'nogo Cobraniya RF. No. 14, 1995: Item 520) and new Arbitrazh Procedure Code of the RF enacted on 5th April 1995 (Sobranie Zakonodatel'stva RF. No. 19, 1995: Item 1709).

<sup>69</sup> There are still problems of a fine distinction between jurisdiction of courts and arbitrazh courts. For example, Article 22-2-Item 8 of the 1995 Arbitrazh PC provides that the arbitrazh court has jurisdiction on economic disputes in terms of recognition of invalidity of a **non-normative** act (*ненормативный акт*) of state organs, organs of local government, which are not corresponding to laws and other normative legal acts and violating rights and legal interests of organisations and citizens. The normative act (*нормативный акт*) is an official written

With regard to issues relating to arbitration in the ICAC, ordinary courts have jurisdiction. Article 6-2 of the 1993 Law on the ICA provides that the function of the examination of decision of the ICAC on its own competence (Article 16-3) and examination of decision of the ICAC (Article 34-2) are exercised by the Supreme Courts of the Republics of the RF and by the regional and district courts. The 1993 Law on the ICA follows the seat theory (Article 1-1), therefore, in so far as arbitration is held in Russia, ordinary courts have jurisdiction. Section 7 of the 1994 Rules on the ICAC clearly provides that the seat of arbitration shall be the city of Moscow, and consequently, the Moscow City Court has jurisdiction in respect of cases in the ICAC. According to Article 20 of the 1993 Law on the ICA, the parties can freely agree on the place of arbitration, therefore if arbitration is held in a city other than Moscow, an ordinary court in that place may have jurisdiction.<sup>70</sup>

In terms of domestic arbitration, under the Temporary Act on Treteiskii Court (*третейский суд*) for Resolving Economic Disputes (hereinafter referred to as the 1992 Law on Domestic Arbitration),<sup>71</sup> arbitrazh courts have jurisdiction (Article 1-Para. 1). Article 1-Para. 2 provides that this rule shall not be applied if one of the parties is located abroad or is organisation with foreign investment, unless the parties agree otherwise. Article 1-Para. 2 provides that this rule shall not be applied to arbitral cases in the ICAC under the RF CCI.

Thus, international commercial arbitration is governed by the 1993 Law on the ICA and subject to ordinary courts. On the other hand, domestic arbitration is governed by the 1992 Law on Domestic Arbitration and under the jurisdiction of arbitrazh courts, which also can hear disputes involving foreign parties. Therefore, if disputes arise on a preliminary issue such as the existence or validity of an arbitration agreement where the issue is whether there is arbitration or not, problems of jurisdiction may arise.

Provided that ordinary courts have jurisdiction on the basis of the 1993 Law on the ICA, these provisions must be applied only when the seat of arbitration is confirmed as in Russia, because of the seat theory. Therefore, it is unclear whether or not the Russian court recognises its jurisdiction over the preliminary issue of the

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document issued by competent organs which establishes, changes or abolishes legal norms in accordance with hierarchical co-ordination of the norms. Unlike a legal act, the normative act has more or less general characteristics. In terms of the provision, the Supreme Court of the RF decided on 6th October 1995 that economic disputes relating to a **normative** act of state organs fell to the jurisdiction of not arbitrazh courts but courts ("Po grazhdanskim delam No. 2." *Byulleten' Verkhovnogo Suda RF*, No. 12, 1995: p. 2).

<sup>70</sup> As of April 1998, there has been no such case in the ICAC (advice from Professor Ivan S. Zykin, Vice President of the ICAC).

<sup>71</sup> *Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF*, No. 30, 1992: Item 1790.

validity or existence of the arbitration agreement between foreign parties.

In the *Atlantic Emperor* in England, one of the foreign parties with no place of business in that country asked the court to appoint an arbitrator on behalf of another foreign party, who disputes the validity or existence of the arbitration agreement stipulating that the seat of arbitration was in that country. On the other hand, in Russia, courts are unlikely to be involved in the appointment of arbitrator, because, under the 1993 Law on the ICA, it is the President of the RF CCI that appoints arbitrators on behalf of the party who does not do so within thirty days after being requested by the other party (Article 11-3). Such a decision of the President cannot be appealed (Article 11-5). It is very unlikely that the President of the RF CCI will examine the validity or existence of the disputed arbitration agreement. Therefore, the Russian court may examine the validity of the disputed arbitration agreement only after the ICAC has decided its own competence.

Even if the other party asks the Russian court to examine the validity of the arbitration agreement, the Russian court is likely to refer the dispute to the ICAC, based on Article 27 of the Russian Civil Procedure Code (CPC), which provides that: "In cases laid down by law or international agreements, disputes arising from civil law relationship may be transferred, based on the agreement of the parties, for settlement of arbitration, the MAC, or the FTAC attached to the USSR CCI." A clear ruling on this point may be taken from the precedents of the ICAC, provided that the Moscow City Court or the Supreme Court of the RF recognises it.

The above practice of referring disputes to arbitration without careful examination conflicts with the principle of the stay of court proceedings on the basis of an arbitration agreement. Usually in most countries, the courts examine the validity of an arbitration agreement, and then refer the dispute to arbitration.

Under the USSR regime, the permanent arbitral institutions had, in practice, exclusive jurisdiction, therefore courts used to refer disputes arising from international trade to arbitration even before one of the parties so requested. The courts did not need to examine the validity of an arbitration agreement. This practice has, however, some logical justifications. If there is some evidence which can to considerable extent guarantee the existence of an arbitration agreement, it is logical that the courts need not examine the validity of the arbitration agreement. Rules on the evidence which can to some extent guarantee the existence of an arbitration agreement will be suggested in the following section.

## I-D. Analysis: Comparison and Suggestion

## I-D-1. Comparison

One of the foreign parties with no residence and business place in a country may ask a court in that country to examine the preliminary issue of the existence or validity of an arbitration agreement. Then, does the court have jurisdiction? Needless to say, if the other foreign party responds to the court proceedings, the court has jurisdiction on the basis of the agreement of jurisdiction, and this is the case in England, Japan and Russia.

In England, the problem can be solved relatively easily, because the necessary condition of the determination of jurisdiction under the common law is the procedural approach, that is, it is dependent on the defendant having been served with a writ of summons or its equivalent. In the *Atlantic Emperor*, the English court recognised the jurisdiction on the basis that the disputed arbitration agreement indicated England as the seat of arbitration.

Although some connection with England is necessary, jurisdiction is eventually determined as a procedural issue. Because of the gap between a connection with England and the procedure of service of a writ, the principle of *forum non conveniens* seems to have been developed in England (Table C3-1). Under this principle, English courts can refuse to issue leave for service out of the jurisdiction, even if it is competent to try the case. This court's discretion in terms of jurisdiction basically does not exist in civil law countries. As long as a writ is served, the English court will examine the validity of the disputed arbitration agreement indicating England as the seat of arbitration.

The UK is a party to the 1965 Hague Convention on Service Abroad. Japan is a party to both the Convention on Civil Procedure signed in Hague in 1954 (hereinafter referred to as the 1954 Hague Convention on Civil Procedure) and the 1965 Hague Convention on Service Abroad.<sup>72</sup> Russia is a member country of the 1954 Hague Convention on Civil Procedure. According to either the 1954 or 1965 Convention, documents in a member country may be served in another member country either through the central authority, judicial authority, or through the consular authority in that country.

In Japan, in so far as following traditional Japanese rules on international jurisdiction, the Japanese court is unlikely to recognise its jurisdiction, when one of the foreign parties with no residence and business place in Japan asks a Japanese court to examine the preliminary issue of the existence or validity of an arbitration

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<sup>72</sup> The 1965 Hague Convention on the Service Abroad covers topics of the service of process abroad and the matters of obtaining evidence abroad. It is a revised and improved version of articles 1 to 7 of the Convention on the Civil Procedure in Hague, 1954.

agreement. The strongest factor in deciding jurisdiction in Japan is the territorial connection especially that of the defendant. In the above case, the defendant is not located in Japan.

Table C3-1 Differences in Jurisdiction over Arbitration in terms of Preliminary Issues

	England	Japan	Russia
Preliminary Condition	Connection with England.	None.	None.
Gap	Principle of <i>forum non conveniens</i> .	None.	None.
Necessary Condition	Making service of a writ.	Application of rules of jurisdiction.	Application of rules of jurisdiction.
Jurisdiction over arbitration in terms of preliminary issues	Court may recognise its jurisdiction if the writ is served.	Court may not recognise its jurisdiction, unless there is any territorial connection, especially of defendant, with Japan.	Court may not examine the issue until the ICAC decides its competence.

In Russia, following the traditional tendency, it is likely that the preliminary issue on the existence or validity of an arbitration agreement would be determined by the arbitral tribunals as an issue within their competence. Interpretation of these kind of rules on jurisdiction will depend on the courts' approach in the future.

## I-D-2. Influence of the *Atlantic Emperor* outside the EU

### I-D-2-a. Competition of Jurisdiction

Thus, approaches to the jurisdiction over the issue of the existence or validity of an arbitration agreement between foreign parties without residence and business place in that country are diversified in three jurisdictions. English court is able to recognise its jurisdiction, and Japanese and Russian appear not to.

In the EU, the decision of the *Marc Rich* case seems to be interpreted



positively, that is, the matters relating to arbitration including the existence or validity of an arbitration agreement are excluded from the scope of the 1968 Brussels Convention. As a result, the court in each country must determine its jurisdiction on this matter based on its own rules on international jurisdiction. This is very likely to cause, as in the case of the *Atlantic Emperor*, competition of jurisdiction, not only within the EU but also outside the EU.

In so far as jurisdiction is determined in England, the possibility of a conflict of jurisdictions is very high. To avoid such a competition, the principle of *forum non conveniens* has been developed in England. The English court, however, did not consider this option in the *Atlantic Emperor*.

Thus, there is the possibility of competition of international jurisdiction on the issue of the existence or validity of an arbitration agreement. Furthermore, the understanding as to the existence of an arbitration agreement is not uniform in the world. What is more, the issue of an arbitration agreement is excluded from the scope of the 1980 Rome Convention in the EU.

If English law is applied, its definition of concluding an arbitration agreement is very wide. Francis Mann stated that the English definition of an agreement in writing extended beyond Article II of the 1958 New York Convention.<sup>73</sup> Mann quoted the case of *Zambia Steel v. Clark & Eaton*,<sup>74</sup> in which an arbitration agreement printed on the reverse of a quotation in the course of negotiation was regarded as valid by reason of oral assent. There is a tendency, probably because of the principle of consideration, to look at the entire course of negotiations under English law to decide whether or not, a valid contract was concluded.<sup>75</sup>

Like in the *Atlantic Emperor*, if there is a competition of jurisdiction, there is a possibility that courts in different countries decide opposite. Professor Bernard Audit, taking the positive interpretation, stated that: "Serious difficulties stem from the fact in some instances the validity or existence of an alleged arbitration agreement raises grave doubt, so that the courts of two Contracting States may take opposite views on that issue."<sup>76</sup>

## I-D-2-b. Hardship to the Party beyond the EU

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<sup>73</sup> Mann, Francis. A. "An 'Agreement in Writing' to Arbitrate." *Arbitration International*. Vol. 3, No. 2, 1987: p. 171 at 171-172.

<sup>74</sup> *Zambia Steel v. Clark & Eaton*. [1986] 2 Lloyd's Rep. 225.

<sup>75</sup> Guest, A. G. general ed. *Chitty on Contracts Vol. 1: General Principles*, 27th ed. London: Sweet & Maxwell, 1994: p.101.

<sup>76</sup> Audit, Bernard. "Arbitration and the Brussels Convention." *Arbitration International*. Vol. 9, No. 1: p. 1 at 25.

### (1) Geographical aspect

The positive interpretation of the judgement of the European Court in the *Marc Rich* case makes the court in a country determine its jurisdiction based on its own rules. It seems that this may bring some burdens upon parties from outside the EU. There are two aspects to this. The first relates to geography. If the defendant in a case similar to the *Atlantic Emperor* is, for example, from Japan or New Zealand, it is particularly unwelcome for him to be forced to travel perhaps to England half way across the world in order simply to dispute an arbitration clause when he denies not just its validity but the very existence of the arbitration agreement. If they do not appear in person, they must appoint English lawyers at a distance, and they may also have language problems to overcome.

The following principle should be remembered that the court of the country where the defendant resides basically has jurisdiction. The Japanese or, say, New Zealand defendants usually could have had the case heard in their own country if there had been no dispute on arbitration. Or, the case could have been heard in the court of the country where the performance of the contractual obligation was made. The same problem faces European defendants in a dispute over the existence or validity of an arbitration agreement indicating Japan or New Zealand as the seat of arbitration, although the seat of arbitration may be usually decided, considering such geographical factors.

### (2) Legal Sociological Aspect

A further difficulty relates to legal sociology. It seems that, especially among European jurists, there is a strong presupposition that arbitration is widely recognised in the world. In the *Marc Rich* case, Mr. Advocate General Darmon stated that:

"I see no advantage for the Community in ignoring the specific legal requirements of international arbitration, a universal method of resolving disputes in international trade. Those needs, as I hope I have shown, are not necessarily identifiable with those set out in the Brussels Convention, an instrument which is designed to ensure the proper administration of justice by the State within the Community."<sup>77</sup>

International commercial arbitration as practised in Western countries is not a

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<sup>77</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855 at 3893.

universally common way of settling disputes, though it is gradually moving in that direction in the sphere of international trade.

There are countries where arbitration is not a popular way of dispute resolution, such as Japan and some other Asian countries influenced by Confucianism. In such countries mediation is often preferred to arbitration or litigation.<sup>78</sup> It often occurs that small companies located out of the cities dealing with foreigners for the first time are unaware of the possibility of arbitration. It is not until the persons receive a notice of arbitration in a distant location that they are surprised by the presence of a tiny inconspicuous arbitration clause on the very bottom of the main substantive contract.

An example can be found in a Japanese land-mark decision arising out of total ignorance of international commercial arbitration by the Japanese party. In *Tokyo-chi-han* S34.8.20,<sup>79</sup> a Japanese trading firm called Nishi-syôji made a contract on 25th January 1954 with Italian ship-owner, G. M. Casaresi Compagnia, to buy a ship (5651t) for \$162,400 on condition that Nishi-syôji would get an import permit from the Japanese Ministry of International Trade and Industry (MITI). The MITI did not permit the purchase of the ship, therefore the contract was not realised. However, Casaresi brought the case into the arbitration court in London on ground of negligence, based on the arbitration agreement, and claimed £20,000 compensation. Nishi-syôji had no idea of what the arbitration was and ignored all the arbitration proceedings. On 1st January 1957, the arbitration court concluded, without the presence of Nishi-syôji, that Nishi-syôji should pay £20,966.50 compensation plus interests and all the expenses of the arbitration. Nishi-syôji declined to realise the award. In 1959, the Tokyo District Court first permitted the enforcement of the foreign award, based on the 1928 Geneva Convention, without examination of the proceedings of the arbitration and the contents of the award.

In those days, not only trading firms but also lawyers in Japan had little idea about arbitration. Although there had been provisions on arbitration in the Japanese Civil Procedure Code, it had been hardly used. The provisions were almost dead letters.<sup>80</sup>

It seems that there is a presupposition that arbitration is common way of dispute settlement in the world especially in the European countries. Accordingly, some European countries such as England take wide definition of concluding an

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<sup>78</sup> See, e.g., Trappe, Johannes. "Conciliation in the Far East." *Arbitration International*. Vol. 5, No. 2, 1989: p.173.

<sup>79</sup> *Tokyo-chi-han* S34.8.20. (*Ka-min-shû*. Vol. 10, No. 8, 1959: p. 1711) (Tokyo District Court's Judgement on 20th August 1959).

<sup>80</sup> Morii, Kiyoshi. *Kokusai-shôji-chûsai*. Tokyo: Tôyô-keizai-shinpô-sha, 1970: pp. 4-5.

arbitration agreement. It may be highly inconvenient for a party unfamiliar with arbitration if such countries determine jurisdiction by rules based on such a presupposition.

If the positive interpretation of the decision in the *Marc Rich* case was to apply only within the territory of the EU, fewer difficulties arise. Within the EU countries, distances are not so great and arbitration is a generally accepted method of settling international commercial disputes. Consequently an ordinary international contract usually includes an arbitration clause. No serious problems arise at least from the geographical or legal sociological point of view, whether either the court of the country where the defendant is situated or the court of the country indicated by the disputed arbitration agreement examines the validity or existence of an arbitration agreement.

### I-D-3. Unified Interpretation of the 1958 New York Convention

#### I-D-3-a. Difference in Purpose as between the 1958 New York Convention and 1968 Brussels Convention

Matters relating to arbitration are governed by a very specific set of rules. In this context, they were excluded from the 1980 Rome Convention; and, in the *Atlantic Emperor*, it seems that matters relating to the existence or validity of an arbitration agreement were, according to the positive interpretation, excluded from the 1968 Brussels Convention. To bring in the special rules on arbitration, multilateral conventions, in particular, the 1958 New York Convention, must be applied, as the judgement of the European Court in the *Atlantic Emperor* stated.<sup>81</sup>

The purposes of the 1968 Brussels Convention and the 1958 New York Convention are slightly different. Clear unification of interpretation of a provision may be a desirable choice in the 1958 New York Convention but not always so in the 1968 Brussels Convention.

The Preamble to the 1968 Brussels Convention states that it is necessary for the legal protection of persons in the Community to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgements, authentic instruments and court settlements.

Regarding the issue of unified interpretation of the place of the performance

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<sup>81</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA*. Case C-190/89 [1991] ECR I-3855 at 3900-3901.

of a contractual obligation, in the case of *Industrie Tessili Italiana Como v. Dunlop AG*<sup>82</sup>, the European Court stated that if the court were to settle where the place of performance of an obligation was to be found by reference to the particular facts of the case, the effect of the decision would extend to all aspects of performance of contracts of the type in question and would influence other aspects of the law which are directly or indirectly linked with performance. The European Court preferred the adoption of uniform rules on the choice of law applicable to contractual obligations.<sup>83</sup> As a result, a broad interpretation of Article 5-1 of the 1968 Brussels Convention on the place of performance was given.

The purpose of the 1968 Brussels Convention is, thus, to introduce an expeditious procedure for securing the enforcement of judgements, across a whole range of subject matter. Therefore, a broad interpretation of a provision is preferred rather than a strict unified interpretation which may affect a whole range of subject matter in various countries. However, if the convention is applied to a particular area, then a unified interpretation of the provision may be desirable having regard to the 1958 New York Convention.

The purpose of the 1958 New York Convention is to facilitate the enforcement of arbitral awards, with a view to enhancing the effectiveness of the legal regime governing international commercial arbitration.<sup>84</sup> A review of the court decisions on the 1958 New York Convention has therefore been undertaken to ensure that the Convention is interpreted uniformly by the courts.<sup>85</sup>

#### I-D-3-b. Rules on International Jurisdiction inferred from the 1958 New York Convention.

Wiegand has observed: "it might be astonishing that the 1968 Brussels Convention is not applicable to arbitration, but the subject of international recognition and enforcement of arbitral awards had been sufficiently resolved, ten years before, by the 1958 New York Convention under the umbrella of the UN, and therefore including the fifteen countries late to become EC Member States."<sup>86</sup>

Hascher also concluded that: "within the 1968 Brussels Convention system,

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<sup>82</sup> *Industrie Tessili Italiana Como v. Dunlop AG*. Case 12/76 [1976] ECR. 1473.

<sup>83</sup> *Id.*, at 1480.

<sup>84</sup> Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: p. 4.

<sup>85</sup> See, e.g., "Court Decisions on the New York Convention 1958." Yearbook of Commercial Arbitration. Vol. I-XXII, 1976-1997.

<sup>86</sup> Wiegand, Christian. "'Brussels' and Arbitration: Approximation of Judiciary Law within the EU and the Potential Impact on International Arbitration." Journal of International Arbitration. Vol. 12, No. 4, 1995: p. 5 at 7.

the protection of arbitration agreements should be effected by giving expression to the policies and purposes of the 1968 Brussels and 1958 New York Conventions through a combined application of Article 57-(1) of the former, and of Article II of the latter.<sup>87</sup> Article 57-1 of the 1968 Brussels Convention provides that this Convention shall not affect any Conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition and enforcement of judgements.

There is consensus that the 1958 New York Convention applies to matters of arbitration. The problem is how. The 1958 New York Convention provides unified rules on enforcement of foreign arbitral awards, but not rules on international jurisdiction as such, except one article on staying court litigation on the grounds of the existence of an arbitration agreement. The unified approach to the 1958 New York Convention merits further explanation.

In most countries, the rules on arbitration are developed in harmony with national law, and international conventions relating to arbitration have been established by representatives from each jurisdiction so as not to conflict with the respective domestic rules.<sup>88</sup> Thus, the interpretation of conventions is generally based on domestic rules in each jurisdiction.

Since the provisions of international conventions themselves have been established in harmony with domestic law, the development of interpretation in individual jurisdiction can assist the interpretation of the conventions themselves.

In Russia, Lebedev has suggested that rules on arbitration must be understood in an international dimension,<sup>89</sup> and has established a theory for a special conflict of laws rule drawn from the 1958 New York Convention.<sup>90</sup> Rules on international private law can be inferred from the 1958 New York Convention, irrespective of proceedings in recognition and enforcement of arbitral awards or staying litigation, although there is a consensus that the provisions of the Convention should not exert

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<sup>87</sup> Hascher, Dominique T. "Recognition and Enforcement of Judgements on the Existence and Validity of an Arbitration Clause under the Brussels Convention." Arbitration International. Vol. 13, No. 1, 1997: p. 33 at 61.

<sup>88</sup> See, e.g., Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994; Holtzmann, Howard M. and Neuhans, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994.

<sup>89</sup> Lebedev, Sergei N. Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Soglashenie Storon. Moscow: Torgovo-prom'shlennaya Palata SSSR, 1988: p. 85.

<sup>90</sup> Lebedev, Sergei N. "International Commercial Arbitration in the Socialist Countries Members of the CMEA." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 158, V, 1977: p.97 at 131-132.

too great an influence upon rules of international private law.<sup>91</sup>

The Italian court decided, in the case relating to the *Atlantic Emperor*, that there was no binding arbitration agreement because there was no agreement in writing as required by the 1958 New York Convention.<sup>92</sup> In France, the Court of Appeals in Paris decided that the validity of an arbitration agreement should be determined in light of the requirement of international public policy, without identifying the applicable national law.<sup>93</sup>

Some commentators may be sceptical about the development of interpretation of international conventions in isolation from domestic interpretation. Even so, the consistent interpretation of international conventions within their own terms in the international context may ultimately lead to real unified rules in the international communities.

Each jurisdiction should of course apply its own rules on jurisdiction, but at the same time, each jurisdiction should also consider rules on international jurisdiction inferred from 1958 New York Convention developed in the international context, independent from domestic rules on jurisdiction. It should then seek the point of harmonisation between domestic and international rules on jurisdiction, rather than persisting with the former only.

### I-D-3-c. Unified Rules on International Jurisdiction in Terms of Responding Jurisdiction

Despite recent developments in the system of international arbitration, there are only a few rules on international jurisdiction in arbitration. Apart from the jurisdiction of the court of the country where recognition and enforcement of awards are realised, the only provision which the 1958 New York Convention contains on jurisdiction is that the court of a Contracting State shall, at the request of one of the parties, refer the parties to arbitration, when seized of an action in a matter in respect

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<sup>91</sup> "United Nations Conference on International Commercial Arbitration Summary Record of the 13th Meeting," 22 U.N. ESCOR 7, U.N. Doc. E/CONF.26/SR.13 (1958); Smedresman, Peter S. "Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments." California Western International Law Journal. Vol. 7, 1977: P. 263 at 326.

<sup>92</sup> *The Atlantic Emperor*, No. 2. [1992] 1 Lloyd's Rep. 624 at 626.

Ironically, the requirements of an arbitration agreement to set aside litigation in Article II and that to recognise and enforce arbitral awards in Article V-1-a are different probably only in Italy. The Italian Supreme Court decided that requirements of Article II of the 1958 New York Convention at the stage of enforcement of the arbitration agreement and that of Article V at the stage of enforcement of the award are different, because Article V operated on a completely different level (Berg, Albert Jan van den, New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: p. 286).

<sup>93</sup> Angel, Jean-Pierre. "French Judicial Attitudes toward International Arbitration." Arbitration International. Vol. 9, No. 2, 1993: p. 121 at 122-124.

of which the parties have made an arbitration agreement in writing, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (Article II-3). If the other party makes no response to the litigation, it should be considered as a waiver of the right to arbitrate.<sup>94</sup> This should have binding power over the relevant decision in courts in other countries. The question of the time-limit of the invocation should be determined by the law of the forum.

It is obvious, therefore, that the court which is asked to stay the litigation can have jurisdiction if the other party makes a request to do so. Basically, the French court decided about the validity of the arbitration agreement in this sense in the case of the *Heidelberg*.<sup>95</sup> However, the issue was more complicated in this case, because the writ was also issued in London, confirming that the bill of lading incorporated the arbitration clause designating London as the seat of arbitration.<sup>96</sup>

Thus, there are other possibilities as to jurisdiction. As in the above case, the other party can seek an injunction restraining the party from pursuing the proceedings from the court of the country which the arbitration agreement designates. The plaintiff in the case of *Alfred C Toepfer International GmbH v. Société Cargill France*<sup>97</sup> did so. The other party can also commence arbitration based on the arbitration agreement with the assistance of the court of the country which the arbitration agreement designates. The *Atlantic Emperor* falls in this category. The other party may ask the court of his own country to examine the validity of the arbitration agreement. In the *Atlantic Emperor*, the defendant did so. However, some countries may not recognise such kind of jurisdiction. As mentioned above, in the *PASF* case,<sup>98</sup> it seems that the High Court recognised the jurisdiction, but dismissed the action on the grounds of lack of interest of action.

Mustill and Boyd suggest that, in the event of competition of jurisdiction, the aggrieved party should exhaust his or her remedies from the local court in order to

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<sup>94</sup> Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: p. 138.

<sup>95</sup> *The Heidelberg*. [1994] 2 Lloyd's Rep. 287 at 290.

"The owners and managers, while not contesting that the Tribunal de Commerce would otherwise have jurisdiction under the 1968 Brussels Convention, contended, first that the dispute fell within the terms of an arbitration clause of a charter-party dated Mar. 7 1991 which they said was incorporated into the bill of lading and, second, that in any event there were proceedings involving the same cause of action and between the same parties pending before the High Court of Justice in London, that the English Court was the Court first seized, and that accordingly the Tribunal de Commerce should decline jurisdiction under Article 21 of the 1968 Brussels Convention."

<sup>96</sup> *Id.*, at 290-291.

<sup>97</sup> *Alfred C Toepfer International GmbH v. Société Cargill France*. [1998] CLC 198; [1998] 1 Lloyd's Rep. 379.

<sup>98</sup> *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* [1996] Times, 22nd July 1996; UK Legal Lexis Current Awareness, Halsbury's Laws of England-Monthly Review.



stay the proceeding before asking for an injunction from the English court.<sup>99</sup>

Critics of the positive interpretation of the judgement of the European Court in the *Marc Rich* case point out that there is no rule to solve the above competition of jurisdiction if the 1968 Brussels Convention is not applied. This kind of competition of international jurisdiction cannot be solved without a unified rule. In this context, in the case of *Heidelberg*,<sup>100</sup> the court ruled that decisions as to the validity of an arbitration agreement fell within the scope of the 1968 Brussels Convention.<sup>101</sup>

It would be desirable to establish a unified rule on this matter in the member countries of the 1958 New York Convention. Until this happens, a unified rule on international jurisdiction in terms of the existence or validity of an arbitration agreement, by analogy with Article II-1 of the 1958 New York Convention seems to solve, to some extent, the problem of competition of international jurisdiction.

### I-D-3-d. Unified Rules on International Jurisdiction in Terms of the Existence of an Arbitration Agreement

#### (1) Unreliability of Enforcement of Arbitral Awards without a Written Agreement

Article II-1 of the 1958 New York Convention clearly provides that each contracting state shall recognise an agreement in writing under which the parties undertake to submit to arbitration. Article II-2 provides that the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

If an arbitration agreement such as referred to in Article II does not exist or if it is invalid, recognition and enforcement of award may be refused at the request of the party against whom it is invoked in the member countries of the 1958 New York Convention (Article V-1). As far as the enforceability of awards is concerned, the existence of an arbitration agreement in writing is a necessary precondition.

Arbitral awards issued without a written arbitration agreement are very unlikely to be enforced by a court of the country where the respondent resides, unless both parties have participated in the arbitration without objection. The respondent may simply ask the court in his or her own country to confirm the non-existence of an arbitration agreement, which the defendant did in the *Atlantic Emperor*. When the

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<sup>99</sup> Mustill, Michael J. and Boyd, Stewart C. Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 460.

<sup>100</sup> The *Heidelberg*. [1994] 2 Lloyd's Rep. 287.

<sup>101</sup> *Id.*, at 300.

claimant asks for enforcement of the award against the respondent, recognition and enforcement of the award may be refused based on Article II of the 1958 New York Convention. The absence of a uniform interpretation of provisions in terms of jurisdiction as regards the existence and validity of an arbitration agreement thus hampers the reliability of recognition and enforcement of arbitral awards under the 1958 New York Convention.

## (2) Unified Rules on International Jurisdiction in Terms of Existence of an Arbitration Agreement

The unified interpretation of rules on jurisdiction should follow from the Article II of the 1958 New York Convention. In arbitration agreements, Article II is generally considered as a uniform rule.

As Judge Diamond stated in the *Heidelberg*, when a court is asked to determine the existence or validity of an arbitration agreement, issues considered by that court are not confined to “arbitration” but necessarily extended to the construction of the underlying contract between the parties.<sup>102</sup> After all, jurisdiction must be determined by considering issues relating to the construction of an arbitration agreement. If there is a unified rule on jurisdiction in terms of the construction of an arbitration agreement, it seems that competition of international jurisdiction can be, to some extent, avoided.

It is obvious that the court which is asked to stay the litigation can have jurisdiction if the other party so requests. As mentioned above, however, there are other possibilities as regards jurisdiction. The other party can seek an injunction restraining the party from pursuing the proceedings from the court of the country which the arbitration agreement designates. The other party can also commence arbitration based on the arbitration agreement with the assistance of the court of the country which the arbitration agreement designates. The other party may also ask the court of his or her own country to examine the validity of the arbitration agreement. As is implied by Mustill and Boyd, the court which is asked to issue injunction should be cautious in the recognition of jurisdiction in such circumstances.<sup>103</sup>

In the above cases, the courts of the member countries of the 1958 New York Convention should recognise their jurisdiction only when there is *prima facie* written evidence of an arbitration agreement, or an exchange of letters, faxes or telegrams which can show **a written offer and a written acceptance** of the arbitration

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<sup>102</sup> Id. at 303.

<sup>103</sup> Mustill, Michael J. and Boyd, Stewart C. Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 460.

agreement by *prima facie* the names of competent parties, unless both the parties agree with the jurisdiction. The seat of arbitration should not be a necessary requirement to recognise jurisdiction in these circumstances, unless the plaintiff insists upon a specific seat or system of arbitration rules: there are several rules to determine the seat of arbitration in the international context, as discussed above.

If there are pervasive business customs such as that of bill of lading, these business customs which satisfy the above requirement should be applied on this matter. From the point of view of parties from countries where arbitration is not a well-established form of dispute resolution, a formal requirement is desirable to determine jurisdiction in those circumstances. Even if the above rule brings a conflict of jurisdiction, decisions as to the existence or validity of an arbitration agreement will be, to considerable extent, the same in different jurisdictions.

This is not a unified interpretation of the rules on the existence or validity of an arbitration agreement or its construction, but a suggestion for a unified rule on international jurisdiction in order to avoid conflict of international jurisdiction.

Using *a posteriori* reasoning, if the above rule had been applied in the cases mentioned above, conflict of jurisdiction could have been avoided. In the *Atlantic Emperor*, the English court would have declined to recognise its jurisdiction due to the absence of a written acceptance of the arbitration agreement.

In *Alfred C Toepfer International GmbH v. Société Cargill France*, since there was a written arbitration agreement, it would appear to make little difference, whether the English court which the arbitration agreement designated as the site of arbitration or the French court in which the defendant had territorial jurisdiction examined the validity of the arbitration agreement.

In the *Heidelberg*, the English court had no jurisdiction because there was written evidence only of arbitration in Paris under the Synacomex arbitration clause, although the plaintiff insisted upon arbitration in London under the Centrocon arbitration clause.<sup>104</sup> However, if the plaintiff had not insisted upon the particular system of rules on arbitration, the English court would have been obliged to recognise its jurisdiction, because there was written evidence on arbitration. Then, the conflict of jurisdiction between the French and English courts could not have been avoided. The only possibility of solving this conflict may be to regard the decision first issued as binding, as Judge Diamond stated in the *Heidelberg*.

If no court has jurisdiction as regards the existence or validity of an arbitration agreement, in terms of the above unified rules, the court of the country

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<sup>104</sup> The *Heidelberg*. [1994] 2 Lloyd's Rep. 287 at 294-295.

where the defendant resides or the court of the country where the performance of the contractual obligation was made, may then examine the validity of an arbitration agreement. However, the answer may already be apparent, to the effect that there is no valid arbitration agreement, otherwise arbitration could already have been held in one country or another.

#### **I-D-4. Suggestion: Proposal for Harmonisation**

The judgement of the European Court in the *Marc Rich* case should be interpreted positively. That is, matters relating to arbitration including the existence or validity of an arbitration agreement should be excluded from the 1968 Brussels Convention. One possible interpretation uses the analogy of the *Van Uden* case. When the scope of the Convention is determined, the nature of the rights which an arbitration agreement serves to protect should be considered. It is the right to submit disputes to arbitration, which is included in the term “arbitration” and should be excluded from the 1968 Brussels Convention.

A further justification is that matters of arbitration are governed by a specific legal regime, and the special rules which have been established in multilateral conventions should be applied.

The positive interpretation of the judgement of the European Court in the *Marc Rich* case allows courts in different jurisdictions to determine the existence of an arbitration agreement according to the law chosen by their own rules on international private law. Some rules, such as the application of the putative proper law of contract in England, may cause hardship to parties from outside the EU. This is also likely to cause conflict of international jurisdiction.

To overcome these problems, the following interpretation of the 1958 New York Convention in terms of jurisdiction as regards the existence or validity of an arbitration agreement is desirable. This will, to some extent, prevent parties outside the EU and unfamiliar with arbitration from suffering injustice, strengthen the reliability of recognition and enforcement of arbitral awards under the 1958 New York Convention, and prevent conflict of international jurisdiction.

First, if one of the parties to an arbitration agreement initiates a litigation in a court in a country and the other party requests the court to stay the litigation, the court has jurisdiction based on Article II-3 of the 1958 New York Convention. The question of the time-limit within which the other party must request the setting aside of the litigation should be determined by the law of the forum. If the other party makes no response to the litigation, it may be considered that it has waived the right to participate in arbitration proceedings for all purposes in all jurisdictions.

However, if the other party commences arbitration with the assistance of the court of the country which the arbitration agreement designates, and then, seeks an injunction in that court, or brings an action to confirm the existence or validity of the arbitration agreement in the court of his or her own country, there is no way to co-ordinate the competition of jurisdiction. This is assuming that proper notice of the injunction or litigation for confirmation has been made to the court in the other jurisdiction.

This kind of conflict of international jurisdiction cannot be solved without a unified rule. Then, it would be desirable to establish such a unified rule in the member countries of the 1958 New York Convention. Until this is in place, a unified rule on international jurisdiction in terms of the existence or validity of an arbitration agreement by analogy with Article II of the 1958 New York Convention seems to solve, to some extent, the above problem of jurisdiction. Even if this unified rule causes a conflict of jurisdiction, decisions as to the existence or validity of an arbitration agreement will be broadly the same in different jurisdictions. This factor might prevent forum shopping.

Secondly, an analogy can be drawn with Article II of the 1958 New York Convention in the situation where court litigation is being promoted in another jurisdiction. If the other party commences arbitration with the assistance of the court of the country which the arbitration agreement designates, and then, seeks an injunction in that court, or brings an action to confirm the existence or validity of the arbitration agreement in the court of his or her own country, the courts of the member countries of the 1958 New York Convention should recognise their jurisdiction as regards the existence or validity of an arbitration agreement only when there is *prima facie* written evidence of an arbitration agreement, or an exchange of letters, faxes or telegrams which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, unless both the parties agree to the jurisdiction.

Thus, if a party commences a court litigation, the preliminary issue of the existence or validity of an arbitration agreement should be determined by either the jurisdiction established on the basis of Article II of the 1958 New York Convention or that of the country indicated as the seat of arbitration by the existence of *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, unless the parties agree otherwise.

After recognising the jurisdiction on the basis of the above rule, whether jurisdiction is established on the basis of the former or latter, the court should refer

the parties to arbitration rather than carefully examine the existence or validity of the arbitration agreement. This practice may contradict with Article II-3 of the 1958 New York Convention, because it provides for full examination of the validity of an arbitration agreement. Article II-3 provides that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The last sentence implies that the court should fully examine the validity of an arbitration agreement when courts are requested a stay.

This, however, contradicts with development of arbitration. If the existence of an arbitration agreement is, to considerable extent, guaranteed by evidence, the court need not fully examine the validity of an arbitration agreement. In such a case, the jurisdiction of arbitration should be established in preference to intervention of court. This is in harmony with the recent development of arbitration where court intervention is minimised.

The following should be the unified rule: courts should unconditionally refer disputes to arbitration if there is a written evidence of an arbitration agreement which can show *prima facie* a written offer and written acceptance of the arbitration agreement by *prima facie* the names of competent parties. In this case, the existence or validity of an arbitration agreement should be argued at the stage of objection to the jurisdiction of the arbitral tribunal, unless the parties agree otherwise.

## II. Confirmation of Validity of an Arbitration Agreement by a Court of the Country where a Party Comes from

### II-A. England

In the *Atlantic Emperor*, the Italian party asked the Italian court to examine the existence of an arbitration agreement. The Italian proceedings founded upon the merits of the oil contract claim involving the Italian party.<sup>105</sup> This indicates a further possibility for jurisdiction as to the preliminary issue of the existence or validity of an arbitration agreement. The party may ask the court of his or her own country to

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<sup>105</sup> Kaye, Peter. "The EEC and Arbitration: the Unsettled Wake of the Atlantic Emperor." Arbitration International. Vol. 9, No. 1, 1993: p. 27 at 53.

examine the validity of the arbitration agreement, even if the seat of arbitration is abroad, and there is nothing but a nationality connection.

In the *PASF* case,<sup>106</sup> the German customers brought proceedings against Phillip Alexander Securities, the English security brokers, in Germany for damages for trading losses. In order to prevent the enforcement of the German judgements, Phillip applied the Court of Appeal in England for declarations that the arbitration agreements were valid and enforceable. Although Section 1 of the Consumer Arbitration Agreements Act guarantees a consumer to bring action irrespective of the existence of arbitration agreement, Section 2 provides that the above does not affect international arbitration agreements.

Meanwhile, the German court decided that the arbitration agreements were either invalid or inapplicable under German law. The English Court of Appeal decided that Consumer Arbitration Agreements Act 1988 restricted the freedom to provide services, which was prohibited by the EC Treaty. Thus, the Court of Appeal recognised its jurisdiction, but dismissed the action on the grounds of lack of interest of action.

## II-B. Japan

If a Japanese party brings an action to the Japanese court in order to confirm the validity or existence of an arbitration agreement designating a foreign country as the seat against the foreign party without residence or business place in Japan, does the Japanese court have jurisdiction?

The general understanding is that the Japanese court does not have jurisdiction for the reason of absence of interest in the action, unless the foreign party resides in Japan, because the Japanese party can dispute the validity of the arbitration agreement when the foreign party requests the Japanese court to enforce the arbitral award.<sup>107</sup>

There are several advantages, however, to recognise the Japanese jurisdiction in such a case. First, the Japanese party can minimise the pressure which would arise from being absent from arbitral proceedings taking place in the foreign country. Secondly, the foreign party may avoid the economic loss of arbitration fees, if the decision of the Japanese court is known at an early stage. Thirdly, under the 1958 New York Convention, at proceedings for the recognition and enforcement of

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<sup>106</sup> *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* [1996] Times, 22nd July 1996; UK Legal Lexis Current Awareness, Halsbury's Laws of England-Monthly Review.

<sup>107</sup> This is based on advice from Professor Kazuo Iwasaki in the Nagoya Keizai University.

arbitral awards, the choice of law applicable to the arbitration agreement in a court in the member country is restricted to the law chosen by the parties or the law of the country where the arbitral award was made. The Japanese court may therefore take a more flexible approach when a Japanese party asks it to examine the validity of the arbitration agreement before arbitral awards are issued in a foreign arbitral tribunal.

There is also a serious disadvantage in recognising jurisdiction in this way: it leaves open for there to be as many decisions as there are nationalities of the parties.

Thus, as regards recognition of jurisdiction over confirmation of the validity of an arbitration agreement against a foreign party by a party in the court of his or her own country, unified rules are necessary, which will be discussed below.

## II-C. Russia

### II-C-1. Under the FTAC

It seems that there was a strong tendency for the FTAC or AC to recognise its competence as far as a Soviet party was involved in disputes, irrespective of the seat theory or non-seat theory. In the case of *Papert & Co., of London v. the Moscow People's Bank, London* in 1963,<sup>108</sup> the FTAC recognised its jurisdiction, even though the Soviet party preferred a foreign litigation.

In this case, the Soviet Bank granted a loan to Papert to cover the payment for the skins and furs purchased from a Soviet organisation. The Soviet Bank held the skins and furs in pledge. Papert did not pay the loan. Then, the Soviet Bank sold the goods in pledge at an auction in London, although Papert had warned that an immediate sale of the pledged goods would entail a considerable loss under the current market conditions.

After the auction, the Soviet Bank demanded Papert to pay US \$74,877.71 in order to clear off the balance of the loan on 29th June 1961. On the other hand, Papert suggested that the dispute should be submitted to the FTAC on 18th October 1961; and insisted on 20th October 1961 that its indebtedness should have been US \$32,334.93 if its warning had been considered by the Soviet Bank.

On 23rd October 1961, the Soviet Bank replied that it was ready to refer the dispute to arbitration in England or the USSR and offered a condition that Papert would pay US \$10,000 by 31st December 1961 and continue payment by remitting 50 per cent of the commission due to Papert to the Soviet Bank.

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<sup>108</sup> *Papert & Co., of London v. the Moscow People's Bank, London*. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission." William E. Butler ed. International Commercial Arbitration: Soviet Commercial and Maritime Arbitration. New York: Oceana Publications, Inc., 1980: Case No. 114.



On 18th June 1962, Papert brought a claim to the FTAC. The Soviet Bank insisted that the FTAC did not have jurisdiction because its offer on 23rd October 1961 was conditional and it was ignored by Papert. The Soviet Bank filed an action with the English Court. On 25th July 1962, the court sustained unconditional liability of Papert for a total of US\$32,334.93, granting the respondent a right to submit his objection.

The FTAC ruled that an arbitration agreement had been concluded between the parties and recognised its jurisdiction only over the amount claimed by the Soviet Bank in excess of US\$32,334.93, which had been acknowledged by Papert and sustained by the decision of the English court. Although the Soviet Bank was disputing the jurisdiction of the FTAC, the FTAC proceeded to decide the case.

The only possible understanding of this is that there had been a presupposition that the Soviet Bank eventually followed the decision of the FTAC. Without this presupposition by the FTAC, it would have been impossible to recognise its jurisdiction. This case showed that the FTAC recognised its competence in so far as Soviet parties were involved, irrespective of their intentions.

## II-C-2. Under the Law on the ICA

Under the 1993 Law on the ICA, involvement of courts is limited to cases of examination of decisions of the ICAC on its own competence and examination of decisions of the ICAC, provided that the seat of arbitration is in Russia. These rules cannot be applied to the case where a Russian party asks the court to examine the validity of an arbitration agreement which provides that the seat of arbitration is in a foreign country, because the seat of arbitration is not in Russia.

The jurisdiction of the Moscow City Court is based on the 1993 Law on the ICA, therefore, as regards preliminary issues such as the existence or validity of an arbitration agreement which the 1993 Law on the ICA does not cover, both courts and arbitrazh courts may have jurisdiction. Article 25-4 of the CPC provides that the courts may try cases in which foreign citizens, stateless persons, or foreign enterprises and organisations take part. Similarly, Article 22-6 of the 1995 Arbitrazh PC provides that the arbitrazh court examines cases involving organisations and citizens of the RF and also foreign organisations, organisations with foreign investments, international organisations, foreign citizens, person without nationality engaging entrepreneurial activity, unless others are regulated by international treaties of the RF.

Considering the historical tendency for the FTAC or AC to recognise the competence in cases where a Soviet party was involved, there is the possibility that a

Russian court or arbitrazh court may recognise their jurisdiction in cases where a Russian party seeks examination of the validity of an arbitration agreement provided that the site of arbitration is in a foreign country. This kind of jurisdiction depends on the courts' approach in the future.

## II-D. Analysis: Comparison and Suggestion

In a case where a party asks the court in his or her own country against a foreign party to examine the validity of the arbitration agreement designating the seat of arbitration in a foreign country, an English court may recognise the jurisdiction on the basis of rules under common law. On the other hand, a Japanese court may not recognise such jurisdiction under traditional rules. It is unclear whether or not Russian court recognises such jurisdiction. Several countries seem to recognise this kind of jurisdiction such as England, Italy, France etc. In the *Atlantic Emperor*, the Italian court heard such a claim.<sup>109</sup>

Taking into account inconvenience to foreign parties, jurisdiction should not be unconditionally recognised in the above case where one of the parties asks the court of his or her own country to examine the existence or validity of an arbitration agreement. Such jurisdiction may be established in as many countries as there are nationalities of the parties.

As mentioned in the previous section, if a party commences a court litigation first, the preliminary issue of the existence or validity of an arbitration agreement should be determined by either the jurisdiction established on the basis of Article II of the 1958 New York Convention or that of the country indicated as the seat of arbitration by the existence of *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, unless the parties agree otherwise.

If a party first requests a court to appoint arbitrators on the behalf of the other party on the basis of a disputed arbitration agreement before the other party commences a court litigation, there are several possibilities of jurisdiction as regards examination of the validity of the arbitration agreement. Needless to say, the other party can respond to the court where the request to appoint arbitrators was made.

The other party can also commence a court litigation in another country, but, in this case, the principal issue may be substantive ones arising from the main

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<sup>109</sup> *Marc Rich and Co. AG v. Societa Italiana Impianti PA (the Atlantic Emperor)* [1989] 1 Lloyd's Rep 548; *Marc Rich and Co. AG v. Societa Italiana Impianti PA (the Atlantic Emperor, No. 2)*. [1992] 1 Lloyd's Rep. 624.

contract rather than the existence or validity of the arbitration agreement. Furthermore, such jurisdiction is likely to be established in a foreign country where the defendant resides. Even if such litigation is commenced in a foreign country, it is unlikely that the party will request a stay, because he or she is trying to promote arbitration with the co-operation of the court in another jurisdiction. Therefore, competition of jurisdiction may occur.

In such case, the other possibility of jurisdiction is the court of the party's own country. Only in this occasion, the jurisdiction of the party's own country should be recognised as regards the examination of the existence or validity of an arbitration agreement. Thus, if a party first requests a court to appoint arbitrators on the behalf of the other party on the basis of a disputed arbitration agreement before the other party commences a court litigation, the other party's choice of jurisdiction as regards examination of the validity of the arbitration agreement should be limited either to that court by responding to the claim or to the court of the other party's own country.

Although there is a possibility of competition of jurisdiction in the above case, there are good reasons for recognition of jurisdiction of his or her own country. First, if the court recognises such jurisdiction from an early stage, this can avoid the stress of the party awaiting the decision of a foreign arbitral tribunal or court as to which he or she regards as lacking competence to decide the case. Secondly, the foreign party can avoid the loss of arbitration fees, if the decision of the court of the other party's country is known at an early stage. Thirdly, under the 1958 New York Convention, at proceedings for the recognition or enforcement of arbitral awards, the choice of law applicable to the arbitration agreement in a court in the member country is restricted to the law chosen by the parties or the law of the country where the arbitral award was made. Therefore, the court can take a more flexible approach when the domestic party asks it to examine the validity of an arbitration agreement before the proceedings of enforcement of arbitral awards is commenced.

Thus, jurisdiction of the party's own country as regards the existence or validity of an arbitration agreement should be recognised only when the other party has commenced arbitration in some country on the basis of the disputed arbitration agreement. Except in such situations, the court of the party's own country should dismiss the action to examine the existence or validity of an arbitration agreement on the ground of lack of interest in the action. In practice, the court of the party's own country is usually involved when the party is likely to be defendant. Once arbitration is commenced by the other party in another country, the possibility of enforcing arbitral awards in the court of the party's own country against him or her as defendant increases. If this court decides in favour of the existence or validity of the

arbitration agreement, there are some merits for the parties in that the arbitration has not been in vain.

As mentioned in the previous section, whether jurisdiction is established in the court where the party requested co-operation to appoint arbitrators or the court of the other party's own country, if there is *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, the court should refer the disputes to arbitration without careful examination of the validity of an arbitration agreement.

Such rules are particular to arbitration only, independent of traditional rules on jurisdiction in a country. Thus, rules on international jurisdiction relating to arbitration should be understood in the specific regime of the international commercial arbitration. The simple criteria of *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* competent parties can considerably reduce possibility of competition of jurisdiction. It may tremendously smooth dispute settlement. To realise the above suggestion, courts should always take into account the possibility of establishing other jurisdictions rather than focusing only upon domestic rules on jurisdiction.

# Part III. Classification of an Arbitration Agreement and its Effects

In England, Japan and Russia, in terms of law on arbitration or international private law, an arbitration agreement is basically classified on the basis of concept under the domestic law on arbitration in that country (*lexi fori*). Since a single definition of an arbitration agreement is not universally accepted, it is inevitable that the process of classifying an arbitration agreement will not always achieve the same outcome in all three countries.

In Japan and Russia, there is disagreement over whether the characteristics of an arbitration agreement are substantive or procedural. There is no such disagreement in England. This Part argues for an integrated approach to the classification of an arbitration agreement. No other commentator has offered such an analysis to date. The classification of an arbitration agreement affects almost all issues relating to arbitration, including, for example, international private law such as the law applicable to the capacity of the party to enter into an arbitration agreement and the law applicable to an arbitration agreement. It also directly or indirectly influences issues on law on arbitration such as the separability of an arbitration agreement, assignment of an arbitration agreement, Kompetenz-Kompetenz and stay of court proceedings on the basis of an arbitration agreement.

In Part III, the classification of an arbitration agreement, and its impact on these issues will be considered, and some possibilities for harmonisation in international private law relating to arbitration and the law on arbitration will be put forward.

## Chapter 4. England

### I. Classification of an Arbitration Agreement

#### I-A. Classification under Domestic Law on Arbitration

An arbitration agreement is classified simply as an ordinary contract under common law<sup>1</sup>. It does, however, have its own distinctive characteristics. An arbitration agreement is an incomplete agreement. The parties cannot agree about all issues at the time of concluding the contract, because the results of the arbitration, that is, the contents of the arbitral awards, are unknown. Thus, a machinery for resolving undecided matters is needed, that is to say, arbitration.<sup>2</sup>

If an arbitration agreement satisfies the definition and written formalities required by the Arbitration Act 1996, it is classified as an arbitration agreement under that Act. Section 6(1) of the Arbitration Act 1996 provides that an arbitration agreement means an agreement to submit to arbitration present or future disputes. Section 5(1) provides that Part I of the Act applies only where the arbitration agreement is in writing. An arbitration agreement which cannot satisfy the Arbitration Act 1996 is governed by common law. Therefore, an arbitration agreement need not be in writing to be valid in England.<sup>3</sup>

The Arbitration Act 1996 regulates judicial control of arbitration, and is a type of domestic procedural law. Therefore, an arbitration agreement under this Act may be classified as a type of contract under procedural law. Indeed, Dicey once stated: "An agreement to submit to arbitration is by its nature procedural: it is not intended to define the mutual rights and obligations of the parties; but to regulate the manner in which they are determined."<sup>4</sup> Thus, by its nature, an arbitration agreement is procedural.

In view of the fact that an arbitration agreement has this procedural characteristic, in both Japan and Russia there is some disagreement relating to the classification of an arbitration agreement, especially in respect of whether it is a procedural or substantive contract. However, this does not come into question in England. The theory of contract under common law is based on precedent arising from the use of contracts. Although, compared with the theory of contract under civil law, it is less complete, it has a flexibility which can be applied to all kinds of contract.<sup>5</sup>

On the other hand, the main characteristic of the civil law system is that it possesses a logical structure, beginning with general principles and moving on to

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<sup>1</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 151.

<sup>2</sup> Treitel, G. H. An Outline of the Law of Contract, 3rd ed. London: Butterworths, 1984: pp. 22-23.

<sup>3</sup> Merkin, Robert. Arbitration Act 1996: An Annotated Guide. London: LLP, 1996: p. 21.

<sup>4</sup> Morris, J. H. C. ed. Dicey and Morris on the Conflict of Laws Vol. 2, 10th ed. London: Stevens & Sons Ltd., 1980: p. 1126.

<sup>5</sup> Treitel, G. H. An Outline of the Law of Contract, 10th ed. London: Butterworths, 1984: p. 1.

more detailed rules, so that the whole structure is, in theory, a complete, self-contained entity.<sup>6</sup> Therefore, application of the rules which govern the creation and effect of an agreement are practised, subject to qualifications. Consequently, some types of contract are governed by special rules peculiar to them, which may have no close analogy at all to the general rules.<sup>7</sup>

Because of the unique nature of an arbitration agreement which has both substantive and procedural characteristics, it is natural that there is disagreement regarding the classification of an arbitration agreement in civil law countries. In practice, however, the difference between contracts under common law and civil law can be overstated. In both systems, the essentials of a contract are an agreement and an intention to create legal relations.<sup>8</sup> An arbitration agreement functions in the same way in both systems, although its classification effects other issues relating to arbitration.

Whether under the preexisting common law or the Arbitration Act 1996, an arbitration agreement is classified as an ordinary contract in England. Because there is no classification of contracts into substantive law and procedural law, the procedural nature of an arbitration agreement does not cause controversy.

## I-B. Classification under International Private Law

Conflict of laws rules must be decided based on the classification of factors into certain judicial concepts or categories. There are many ideas as to classification or characterisation (otherwise termed qualification). An agreement can be classified according to the domestic law of the forum, appropriate foreign law or rules under international private law itself, independent of foreign and domestic substantive law.<sup>9</sup>

Some English commentators have been critical about the above disputes on classification. Dicey stated: "Characterisation has been made needlessly difficult by writers who have created a conflict problem within a conflict problem by insisting that characterisation itself involves a choice of law, that is to say that any court faced with a characterisation problem must first decide what law should be applied to

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<sup>6</sup> Marsh, P. D. V. Comparative Contract Law England, France, Germany. Hampshire, England: Gower Publishing, 1994: p. 33.

<sup>7</sup> Treitel, G. H. An Outline of the Law of Contract, 10th ed. London: Butterworths, 1984: p. 2.

<sup>8</sup> Keenan, Denis. Smith & Keenan's English Law, 11th ed. London: Pitman Publishing, 1995, p.181.

<sup>9</sup> Rabel, Ernst. The Conflict of Laws: A Comparative Study. Ann Arbor, USA: University of Michigan Law School, 1958: p. 55.

decide the matter. Once this idea is rejected, the way lies open for the courts to seek common sense solutions based on practical considerations.”<sup>10</sup>

An arbitration agreement is classified as an ordinary contract in England. The rules governing classification and the rationale of English conflict of laws rules can find the proper law of contract. There is no need for consideration of complex procedural or substantive issues, as is necessary in some other countries.

## II. Under International Private Law

### II-A. Law Applicable to the Capacity of Parties to Enter into an Arbitration Agreement

#### II-A-1. Capacity of a (Natural) Person

##### II-A-1-a. Application of the Law Applicable to the Substantive Contract

The issues of the law applicable to the capacity of a party to enter into an arbitration agreement is a very significant issue. However, there is no clear guidance on this issue in the Arbitration Act 1996. Neither Section 9 (Stay of Legal Proceedings) nor Section 30 (Competence of Tribunal to Rule on its Own Jurisdiction) provides clear guidance as to the capacity of parties to enter into an arbitration agreement.

Needless to say, if the party does not have the capacity to enter into an arbitration agreement, the arbitration agreement is void. Therefore, the arbitral tribunal must examine whether or not the parties had the capacity to enter into the arbitration agreement. Article V-1 of the 1958 New York Convention also provides that recognition and enforcement of the award may be refused, if the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or if the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

It is, however, unclear to what extent the court or arbitral tribunal should examine the capacity of the parties to enter into an arbitration agreement. It is sometimes very difficult to determine, for example, whether or not agents were clearly authorised by companies to enter into an arbitration agreement. This will be discussed in the following section.

As mentioned above, English law classifies an arbitration agreement as an

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<sup>10</sup> Collins, Lawrence, ed. Dicey and Morris on the Conflict of Laws Vol. 2, 12th ed. London: Sweet & Maxwell, 1993: p. 47.



ordinary contract. Therefore, there is no controversy as to application of the law concerning the capacity of a party to enter into a contractual act or procedural act.

Although it has not been clearly stated, there appear to be two ways of determining the law applicable to the capacity of a party to enter into an arbitration agreement in England. Whichever way is chosen, the result is almost the same but application of an international treaty is slightly different.

The first way is to determine the law applicable to the capacity of a party to enter into the main substantive contract which includes an arbitration clause and apply that law to the arbitration agreement. This is based on the principle that the arbitration agreement should be governed by the same law as the main substantive contract. In *National Gypsum Company, Inc. v. Northern Sales, Ltd.*,<sup>11</sup> the Supreme Court of Canada decided that the law applicable to the arbitration agreement was American law because the substantive law applicable to the main contract was American law.<sup>12</sup>

The question as to which laws are applicable to contracts is regulated by the Contracts (Applicable Law) Act 1990 which gave effect to the EEC Convention on the Law Applicable to Contractual Obligations (hereinafter referred to as the 1980 Rome Convention).<sup>13</sup> However, legal capacity to contract is excluded from the Convention because of differences between common law and civil law regarding determination of capacity. Under the common law, the contractual capacity of an individual is regarded as a contractual issue. By comparison, under the civil law contractual capacity is determined by the law of status (Article 1(2)(a)).

Exceptionally, Article 11 of the 1980 Rome Convention can be applied (Article 1(2)(a)). Article 11 provides that in a contract between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the application of another law, only if the other party was aware of this incapacity at the time of the conclusion of the contract, or was not aware as a result of their own negligence. Thus, unless the parties to a contract are in the same country, the common law rules on contractual capacity must be applied in terms of the capacity of parties to enter into an arbitration agreement.

## II-A-1-b. Application of the Law Applicable to the Arbitration

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<sup>11</sup> *National Gypsum Company, Inc. v. Northern Sales, Ltd.* [1963] 2 Lloyd's Rep. 499.

<sup>12</sup> *Id.* at 504-505.

<sup>13</sup> The Convention was finalised at a special meeting of the Council of the European Communities in Rome on 19th June 1980 and was opened for signature. The UK signed it in 1981 and ratified it in January 1991. The Convention came into force on 1st April 1991.

## Agreement Itself

The first alternative is not an absolute rule, because, although the governing law of the arbitration agreement is normally the same as the law governing the main substantive contract, there may be exceptional cases where they are different.<sup>14</sup> In *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.h. v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.*,<sup>15</sup> the Court of Appeal stated that an arbitration agreement was a self contained contract collateral or ancillary to the main contract and need not be governed by the same law which governed the main contract.

The second alternative for determining the law applicable to the capacity of a party to enter into an arbitration agreement involves finding the law applicable to the arbitration agreement itself. In this way, English law relies on the law governing the capacity of a person to enter into an ordinary contract.<sup>16</sup> As mentioned above, although contractual capacity is excluded from the Contracts Act 1990, Article 11 of the Act can be applied as an exception.

Arbitration agreements are, however, excluded from the scope of the 1980 Rome Convention. Although the UK argued that the 1980 Rome Convention should include arbitration agreements, Germany and France were against this in view of the fact that in civil law countries, there is disagreement as to the classification of an arbitration agreement.<sup>17</sup> Since the 1980 Rome Convention is only intended for contracts governed by substantive law, civil law countries can not simply apply the rules of the 1980 Rome Convention to arbitration agreements. In England, where an arbitration agreement is regarded simply as an ordinary contract, the application of the 1980 Rome Convention to deal with disputes involving an arbitration agreement does not involve problems of legal theory.

In summary, the Contracts (Applicable Law) Act 1990 which gave effect to the 1980 Rome Convention is not applied to determine capacity of a person to enter into both a substantive contract and an arbitration agreement. Although the exceptional provision of Article 11 of the 1980 Rome Convention can be applied in the case of substantive contracts, the Contracts Act 1990, including the exceptional provision, is not applied at all in the case of an arbitration agreement. Consequently,

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<sup>14</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p.63.

<sup>15</sup> *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.h. v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.* [1987] 2 Lloyd's Rep. 246.

<sup>16</sup> Sutton, David St, John; Kendall, John; Gill, Judith ed. Russell on Arbitration, 21st ed. London: Sweet & Maxwell, 1997: p. 95 (3-002).

<sup>17</sup> Collins, Lawrence ed. Dicey and Morris on the Conflict of Laws Volume 2, 12th ed. London: Sweet & Maxwell, 1993: pp. 1201-1202.

rules governing ordinary contracts under the common law must be applied to determine the law applicable to the capacity of parties to enter into an arbitration agreement itself. Considering the development of the principle of the separability of an arbitration agreement, the latter approach seems to be more appropriate.

### II-A-1-c. Rules on the Law Applicable to the Capacity of a Person to enter into contracts under Common Law

The question of the law applicable to the capacity of a party to enter into contracts under common law is somewhat unclear, in view of the lack of case law.<sup>18</sup> It is either the law of the party's domicile (*lex domicilii*) or the law of the country where the contract was concluded (*lex loci contractus*).

In *Male v. Roberts*,<sup>19</sup> Lord Eldon stated: "the contract must be governed by the laws of that country where the contract arises." Similarly, in *Baindail (otherwise Lawson) v. Baindail*,<sup>20</sup> the Probate Division stated that the capacity to enter into an ordinary commercial contract should be determined not by the law of the domicile but by the *lex loci*, although the validity of marriage, at issue in this case, was decided by the law of the party's domicile. Recently, in *Bodley Head Ltd v. Flegon*,<sup>21</sup> the validity of a contract of agency was determined by the law of the country where it was made.

In *Sottomayor v. De Barros*,<sup>22</sup> on the other hand, Cotton, L. J. stated that it is a well-recognised principle of law that personal capacity to enter into any contract is to be determined by the law of domicile.<sup>23</sup>

Dicey and Morris suggest that the contract should be regarded as validly concluded in England when a person lacks capacity to enter into an arbitration agreement under the law with which the arbitration agreement is most closely connected, but has capacity by the law of his or her domicile, or vice versa.<sup>24</sup>

## II-A-2. Capacity of a Juridical Person

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<sup>18</sup> Collins, Lawrence ed. *Dicey and Morris on the Conflict of Laws Volume 2*, 12th ed. London: Sweet & Maxwell, 1993: p. 1272; Mayss, Abia. *Conflict of Laws*, 2nd ed. London: Cavendish Publishing Ltd., 1997: p. 105; Graveson, R. H. *Conflict of Laws: Private International Law*, 7th ed. London: Sweet & Maxwell, 1974: pp. 402-403.

<sup>19</sup> *Male v. Roberts*. (1799) 3 Esp. 163; 170 E.R. 574.

<sup>20</sup> *Baindail (otherwise Lawson) v. Baindail*. [1946] P.D. 122.

<sup>21</sup> *Bodley Head Ltd v. Flegon*. [1972] 1 WLR 680.

<sup>22</sup> *Sottomayor v. De Barros*. (1877) P.D. 1.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> Collins, Lawrence ed. *Dicey and Morris on the Conflict of Laws Volume 2*, 12th ed. London: Sweet & Maxwell, 1993: pp. 1271-1275.

The Contracts (Applicable Law) Act 1990 is not applied to matters of company law, including the contractual capacity of a company (Article 1(2)(e)). Therefore, common law must be applied.

In terms of the general legal capacity of a juridical person, the basic rule is that the rules of the constitution of the corporation and the law of the country where the arbitration agreement was concluded are applied. The constitution of the corporation is governed by the law of the country where it was formed.<sup>25</sup>

It is unusual for the constitution of a company to prohibit the concluding of an arbitration agreement. However, the problem of authorisation of agents to enter into an arbitration agreement may often occur. If the authorisation is invalid according to the constitution, the company does not have the legal capacity to enter into an arbitration agreement on the basis of the *ultra vires* doctrine. In *First Russian Insurance Company (in Liquidation) v. London and Lancashire Insurance Company, Ltd.*,<sup>26</sup> Romer J. stated: "A company incorporated under Russian law has powers only as the Russian law may give to it."<sup>27</sup> In this case, although the Russian law was applied, Romer J. concluded that no purpose would be served in determining the authority of the company's agents on the basis of Soviet law, which provided for the confiscation of the company and denied any legal liability after the Revolution.<sup>28</sup>

Investigation of the relevant constitutional documents is desirable in the case of companies incorporated outside England.<sup>29</sup> If foreign companies (formed and registered in a foreign country) carry on business in the UK, they are obliged by Section 691(1)(a) of the Companies Act 1985 to file a copy of their instrument of incorporation with the Registrar of Companies.

As mentioned above, it is, however, unclear to what extent an arbitral tribunal in particular should examine the capacity of the parties to enter into an arbitration agreement. It is sometimes very difficult to examine whether or not, for example, agents were clearly authorised by companies to enter into an arbitration

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<sup>25</sup> Collins, Lawrence ed. *Dicey and Morris on the Conflict of Laws Volume 2*, 12th ed. London: Sweet & Maxwell, 1993: p. 1111.

Ex. Article 16(2) of the 1968 Brussels Convention provides that the courts of the Contracting State in which the company has its seat shall have exclusive jurisdiction in proceedings on the validity of the constitution. Therefore, in conformity with this provision, the general legal capacity of the company must be examined by the law of the country where it has seat, that is, was formed.

<sup>26</sup> *First Russian Insurance Company (in Liquidation) v. London and Lancashire Insurance Company, Ltd.* [1928] Ch. 922.

<sup>27</sup> *Id.* at 935.

<sup>28</sup> *Id.* at 953.

Romer J. applied English law in terms of business carried in London, although the company incorporated in Russia had been confiscated.

<sup>29</sup> Sutton, David St, John; Kendall, John; Gill, Judith ed. *Russell on Arbitration*, 21st ed. London: Sweet & Maxwell, 1997: p. 96 (3-003).

agreement. One possible understanding of the Arbitration Act 1996 is that the arbitral tribunal need not examine the capacity to enter into an arbitration agreement in great detail, unless a party queries it. This is because, neither Section 9 nor Section 30 directly mentions capacity with respect to arbitration agreements. Another understanding is that the court or arbitral tribunal should fully check the capacity, by, for example, asking the company about the authorisation of the agent, even in the absence of an appeal by one of the parties.

Although it seems strange, it quite often happens that one of the parties insists at the very end of the arbitral proceedings that the agent who concluded the arbitration agreement or participated in the arbitration did not have the capacity to do so.<sup>30</sup> It is impossible to regard the incapable natural or juridical person as capable. In so far as the authorisation of an agent is concerned, however, it may be possible for arbitral tribunals to require confirmation of the authorisation from the juridical person to conclude the arbitration agreement or to participate in the arbitration. If the juridical person later admits that they do not have the capacity, this should become a matter of damages to be awarded to the other party.

To avoid the risk of one party alleging incapacity, the arbitral tribunal should be obliged at an early stage to seek confirmation from the juridical person as regards the authorisation of agents to conclude the arbitration agreement or to participate in the arbitration.

## II-B. Law Applicable to an Arbitration Agreement

### II-B-1. Under Common Law

Since an arbitration agreement is regarded as an ordinary contract in England, the law applicable to an arbitration agreement is determined by the rules of conflict of laws governing an ordinary contract. The Contracts Act 1990, which enacted the 1980 Rome Convention, regulates the rules of conflict of laws pertaining to ordinary contract. However, issues on arbitration are excluded from the Convention, and consequently the Act is not applied to arbitration agreements. Therefore, the basic rules of the proper law of contract are applied, that is, the law applicable to the contract is the law of the country with which it is most closely connected.<sup>31</sup> The law

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<sup>30</sup> "International Arbitration." Lecture by Mr. Martin Hunter at the Old College, University of Edinburgh on 6th March 1997.

<sup>31</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p.63.

governing an arbitration agreement covers its validity, effect, and interpretation.<sup>32</sup>

If parties expressly agree on the law that should govern the arbitration agreement, then this is indeed the law that will be applicable, based on the principle of the autonomy of the parties. In the absence of a clearly expressed choice of law governing an arbitration agreement, the following factors are assessed to determine the law applicable. First, whether the arbitration agreement clearly states that the arbitration will take place in a particular country. Second, whether the arbitration agreement states that the arbitrators will be a particular nationality. Third, whether the parties are carrying on business in a particular country.<sup>33</sup>

Previously, there was a strong presumption that if the arbitration agreement identified a particular country in which to arbitrate, the law of that country was to be regarded as the proper law of the main contract, and consequently as the law applicable to the arbitration agreement.<sup>34</sup> This view was dismissed in *Compagnie D'armement Maritime S.A. v. Compagnie Tunisienne De Navigation S.A.* Lord Reid stated that “it would be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract.”<sup>35</sup>

There is also a basic principle that the proper law of the main contract is normally the law applicable to the arbitration agreement. Mustill and Boyd state that although there is a principle that an arbitration agreement is regarded as independent from the main contract, it is unusual to stipulate, in an arbitration agreement, a governing law which is to apply to the arbitration agreement only and nothing else.<sup>36</sup> This statement clearly shows the ‘collateral characteristics’ of an arbitration agreement in relation to its connection with the main contract.

As mentioned in *Harbour Assurance Ltd. v. Kansa General International Insurance Co. Ltd.*,<sup>37</sup> an arbitration clause had been held to be a self-contained contract collateral to the main contract. As an arbitration agreement is classified as an ordinary contract in England, it is treated as very close to the main contract, another ordinary contract. The principle of the separability of an arbitration

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<sup>32</sup> Collins, Lawrence ed. Dicey and Morris on the Conflict of Laws Volume 1, 12th ed. London: Sweet & Maxwell, 1993: p. 578.

<sup>33</sup> Id.

<sup>34</sup> Id. at 577.

<sup>35</sup> *Compagnie D'armement Maritime S.A. v. Compagnie Tunisienne De Navigation S.A.* (1971) A.C. 572 at 584.

<sup>36</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p.62, footnote 12.

<sup>37</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701.

agreement makes it possible to apply a different law to the arbitration agreement than that applicable to the main contract.

## II-B-2. Effects of Classification in Application of Foreign Law

As mentioned above, there is disagreement in respect of the classification of an arbitration agreement in some civil law countries, but not in England. This means, therefore, that the classification of an arbitration agreement will be an issue in the application of foreign law in England.

The method of application of the proper law of contract in England is incorporation, in which a foreign law is incorporated into English law. As a result, contractual terms are interpreted in terms of English law.<sup>38</sup> It is a general rule that the foreign law is assumed to be the same as English law, except in so far as the contrary is alleged and proved.<sup>39</sup> The parties must allege that the foreign law is different from English law.

In principle, foreign law is treated as fact in English law. Therefore, foreign law has to be adequately pleaded. A party must lead evidence on the peculiar sense and construction of words in a foreign document or matters of substantive foreign law.<sup>40</sup> As a result, it is possible for the English court to reach different conclusions in different cases as to the given rule of foreign law, based on a parties' pleadings. In the case of *Prodexport Co. v. Man Ltd.*,<sup>41</sup> Mocatta J. stated that change of foreign law was a question of fact, and a wrong decision of fact could not constitute misconduct by the arbitrators.

In one case, newly established Soviet law was applied instead of Imperial Russian law. In *Lizard Brothers and Company v. Midland Bank, Ltd.*,<sup>42</sup> Lord Wright stated that the court must act upon the evidence before it in the actual case, and consequently Soviet law should apply here, even if Imperial Russian law had been applied in another case. Similarly, the application of recent Russian law or Soviet law also depends on evidence before the court in England.

The result of the classification of an arbitration agreement under foreign law in England will not always be the same, in the event of disagreement. It may be

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<sup>38</sup> Collins, Lawrence. ed. Dicey and Morris on the Conflict of Laws Vol. 2, 12th ed. London: Stevens & Sons Ltd., 1980: p. 1222.

<sup>39</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England, 2nd ed. London: Butterworths, 1989: p. 72.

<sup>40</sup> *Ascherberg v. Casa Musicale Sonzogno (Ch.)* [1971] 1 W. L. R. 173 at 174 and 1128.

<sup>41</sup> *Prodexport Co. v. Man Ltd.* [1973] 1 Q.B. 389.

<sup>42</sup> *Lazard Brothers and Company v. Midland Bank, Ltd.* [1932] A.C. 289 at 297-298.

possible to change what is understood by the classification of an arbitration agreement based on the most recent precedent in a foreign country in the course of the trial in England, but otherwise, "where a foreign law is incorporated in a contract as a contractual term, it remains part of the contract even if it may have been amended or repealed."<sup>43</sup>

## III. Under Law on Arbitration

### III-A. Principle of Separability

#### III-A-1. Theories on Separability

Schwebel has stated: "the very concept and phrase 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreements if needs be."<sup>44</sup>

The question of the separability of an arbitration agreement usually arises when the main substantive contract is deemed to be invalid. Then, to settle the dispute arising from the invalidity of the main contract by arbitration, the arbitration agreement must be valid, separate from the main contract. This issue will arise when arbitrators decide their own competence and when courts are asked to stay proceedings on the grounds of the existence of an arbitration agreement.

The term "separability" relates to the main contract. If there is equal focus upon two contracts, the main contract and arbitration agreement,<sup>45</sup> the term "severability" may be more suitable. When an arbitration agreement is taken alone, the term may be "autonomous" of an arbitration agreement. They are employed interchangeably.<sup>46</sup>

There seem to be five basic explanations of the principle of separability offered by scholars in the world. The first one is based on the will of the party. It was first explained by S. M. Schwebel<sup>47</sup> and is referred to by Russian Professor, S. N. Lebedev, as the presumption theory (*теория презумции*). Under this theory, the will of the parties is decisive. It is presumed that since the parties' will is to exclude the jurisdiction of the state courts, this exclusion should be extended even

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<sup>43</sup> Collins, Lawrence. ed. Dicey and Morris on the Conflict of Laws Vol. 2, 12th ed. London: Sweet & Maxwell, 1993: p. 1223.

<sup>44</sup> Schwebel, Stephen M. International Arbitration: Three Salient Problems. Cambridge: Grotius Publications Ltd., 1987: p.5; see also, Gardner, Anthony. "The Doctrine of Separability in Soviet Arbitration Law: An Analysis of *Sojuzneftexport v. JOC Oil Co.*" Columbia Journal of Transnational Law. Vol. 28, 1990: p. 301 at 304.

<sup>45</sup> Id. Schwebel, at 5 (the third explanation of the principle of separability).

<sup>46</sup> Id. at 3.

<sup>47</sup> Id. at pp. 3-4.



in a case where the main contract including an arbitration agreement is invalid.<sup>48</sup> According to Lebedev, however, this presumption is no more than a myth.<sup>49</sup> This is particularly true in cases involving persons from countries where arbitration is not a popular way of dispute settlement, such as Japan and other Asian countries influenced by Confucianism.<sup>50</sup>

The second explanation emphasises expediency. If one party can deny the other party's right to arbitrate disputes by alleging that the contract lacks initial validity, it would always be open to a party to vitiate an arbitration agreement by simply declaring the contract void. A national court would then be forced to examine the validity of the contract and arbitration agreement. Since this would be time-consuming and expensive, it would conflict with the basic aims of arbitration to ensure speed and simplicity.<sup>51</sup> Thus, according to this second explanation, the principle of the separability of an arbitration agreement has been developed in order to provide for the efficient operation of arbitration agreements within the commercial sphere.

The third explanation is based on logical consequence, and is referred to by Lebedev as the 'special principle of interpretation' (**специальное правило толкования**). In practice, the termination of the main contract does not mean the end of any relationship between the parties. There may be problems of compensation, unlawful enrichment, etc. It is reasonable, therefore, to rule an arbitration agreement valid in order to deal with such problems.<sup>52</sup>

The fourth interpretation of the principle of the separability of an arbitration agreement stems from the fact that the arbitration agreement is distinguished from the main contract in character.<sup>53</sup> Most often an arbitration agreement is classified as procedural. Thus, the fourth interpretation is called procedural or jurisdictional theory (**процессуальная или юрисдикционная теория**). An arbitration agreement is separate from the main contract, which is deemed to be based on contract or consensus, and concerns a material right (**материальное-право**). According to this classification, arbitration fulfils the role of sovereign, and serves as

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<sup>48</sup> Lebedev, Sergei N. Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon. Moscow: Torgovo-promyshlennaya Palata SSSR, 1988: pp. 79-80.

<sup>49</sup> Id. at 80.

<sup>50</sup> See, e.g., Trappe, Johannes. "Conciliation in the Far East." Arbitration International. Vol. 5, No. 2, 1989: p.173.

<sup>51</sup> Schwebel, Stephen M. International Arbitration: Three Salient Problems. Cambridge: Grotius Publications Ltd., 1987: p. 4.

<sup>52</sup> Lebedev, Sergei N. Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon. Moscow: Torgovo-promyshlennaya Palata SSSR, 1988: pp. 80-81.

<sup>53</sup> Schwebel, Stephen M. International Arbitration: Three Salient Problems. Cambridge: Grotius Publications Ltd., 1987: p. 5.

part of the system of national justice.<sup>54</sup>

Theories of classification usually attempt to clarify the overall function of arbitration rather than to focus upon the nature of an arbitration agreement.<sup>55</sup> There are four possible theories as to the classification of arbitration: the procedural or jurisdictional theory, the contractual or consensus (*договорная* or *консенсуальная теория*), the mixed or hybrid (*смешанная, промежуточная, or гибридная*) and original or *sui generis* (*автономная*). However, none is entirely satisfactory due to the complexity of arbitration.<sup>56</sup>

Levedev provides a fifth explanation, which is based on the function of the positive legal norm (*позитивная правовая норма*) of an arbitration agreement. According to this theory, it is recognised that an arbitration agreement can have legal force independent from the main contract.<sup>57</sup> Therefore, a party can positively invoke this when the invalidity of the main contract threatens to undermine the arbitration agreement.

Development of the principle of the separability of an arbitration agreement in England, Japan and Russia will be explained on the basis of these five explanations in Part III.

### III-A-2. Repudiation of a Contract

Section 7 of the Arbitration Act 1996 accepts the principle of the separability of the arbitration agreement. Section 7 provides: “Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement”.

Historical developments explain why the principle of the separability of an arbitration agreement was introduced. This principle had not been fully accepted in England until the case of *Harbour Assurance Ltd. v. Kansa General International*

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<sup>54</sup> Id. at 83.

<sup>55</sup> See, e.g., Minakov, A. I. *Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov*. Moscow: Yuridicheskaya literatura, 1985: pp. 77-85; David, Rene. *Arbitration in International Trade*. London: Kluwer Law and Taxation Publishers, 1985: pp. 76-78; Chukwumerije, Okezie. *Choice of Law in International Commercial Arbitration*. London: Quorum Books, 1994: pp. 9-15.

<sup>56</sup> See, e.g., id. David, at 78; Chukwumerije, at 14.

<sup>57</sup> Lebedev, Sergei N. *Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon*. Moscow: Torgovo-promyshlennaya Palata SSSR, 1988: p. 82.

*Insurance Co. Ltd.*<sup>58</sup> in 1993. The orthodox view was that:

"if the contract in which the arbitration clause was contained was void *ab initio* (from the beginning), and therefore nothing, so also must be the arbitration clause in the contract. This is the proposition that nothing can come of nothing; *ex nihil nil fit*."<sup>59</sup>

In 1942, in *Heyman v. Darwins*,<sup>60</sup> Lord Macmillan stated: "the dispute is whether there has ever been a binding contract between the parties. Such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate."<sup>61</sup> This became the standard interpretation of the principle of separability.

In this case, Lord Wright took a broader view: "If the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction."<sup>62</sup>

As regards repudiation of the contract, the House of Lords decided that the repudiation of the substantive contract did not effect the arbitration clause. Lord Macmillan stated: "Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party still has his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages."<sup>63</sup>

Lord Wright and Lord Porter agreed with this logic. Lord Wright followed the reasoning in *Sanderson's* case<sup>64</sup> and accepted "the proposition that an arbitrator has jurisdiction to adjudicate on breaches of a contract partly or wholly performed and still in existence for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance by the other."<sup>65</sup> Lord Porter stated: "At most the party repudiating is not approbating and reprobating the contract, if that phrase be permitted, but only his future liabilities under it. The contract itself is still in

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<sup>58</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701.

<sup>59</sup> *Id.* at 707.

<sup>60</sup> *Heyman v. Darwins* [1942] A.C. 356.

<sup>61</sup> *Id.* at 370-371.

<sup>62</sup> *Id.* at 384.

<sup>63</sup> *Id.* at 373.

<sup>64</sup> *Sanderson's* case. [1922] S.C.(H.L.)117, 127.

<sup>65</sup> *Heyman v. Darwins* [1942] A.C. 356 at 381.

existence and with it the arbitration clause”.<sup>66</sup> These decisions follow the explanation of the separability of an arbitration agreement based on logical consequence.

In Japan and Russia, the principle of the separability of an arbitration agreement is based on the separate characteristics of an arbitration agreement. This will be discussed in the following chapters. On the other hand, in England, an arbitration agreement is classified as an ordinary contract, and consequently no special characteristics are relied upon to explain the principle of the separability of an arbitration agreement. Separability is explained as a logical consequence of settling disputes arising from the repudiation of a contract by arbitration. Even if the contract was repudiated, matters arising from the contract are still in existence, as is another ordinary contract, that is, the arbitration clause.

### III-A-2. Rectification of the Contract

As regards the issue of rectification of the contract, courts used to be reluctant to recognise the principle of the separability of an arbitration agreement. In 1912, in *Printing Machinery Company, Limited v. Linotype and Machinery, Limited*,<sup>67</sup> Warrington J. stated that it would be absurd to give an arbitrator the power to determine a question of rectification of the contract and to let the matter come back to the court. If the claim for rectification must be decided by the court, it would be more convenient that other questions should also be decided by the court.<sup>68</sup>

This logic based on expediency of court proceedings seems to have been rejected in South Africa. In *Kathmer Investments Ltd. v. Woolworths (Pty) Ltd.*,<sup>69</sup> Rumpff, J. A. stated that “if a dispute about rectification must be considered not to arise from the contract, it would seem to follow that a dispute about subsequent release or estoppel or waiver or set-off in relation to rights or obligations under the contract would also have to be considered to be a dispute arising out of the contract, and therefore not referable to arbitration”.<sup>70</sup> Since it sounds not logical, as early as 1970, the appeal court in South Africa deviated from the traditional view in *Printing Machinery Company, Limited v. Linotype and Machinery, Limited*, outlined above.

A statement in the Consultation Document accompanying the draft Bill of the Arbitration Act stated: “whatever the degree of legal fiction underlying the doctrine

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<sup>66</sup> Id. at 400.

<sup>67</sup> *Printing Machinery Company, Limited v. Linotype and Machinery, Limited*. [1912] 1 Ch. 566.

<sup>68</sup> Id. at 573.

<sup>69</sup> *Kathmer Investments Ltd. v. Woolworths (Pty) Ltd.* 1970 2SA 498.

<sup>70</sup> Id. at 504.

of autonomy or separability, English law now fits firmly into the mainstream of this international consensus.”<sup>71</sup> Therefore, whether the reasoning in South African cases is followed or not, English courts may now choose to recognise the separability of an arbitration agreement in a case involving rectification of the main contract. In the Consultation Document, the principle of the separability of an arbitration agreement was regarded as an internationally accepted principle.

As mentioned above, the logical development of the separability of an arbitration agreement under common law arises from classification of an arbitration agreement as an ordinary contract. English law should not underrate the importance of this development. The development of this principle in practice under international commercial arbitration itself is, on the other hand, based on expediency.

### III-A-3. Initial Non-Existence of a Contract

The scope of cases covered by an arbitration agreement despite problems with the main contract has gradually been widened in order to guarantee the principle of the separability of an arbitration agreement.

In 1988, in *Ashville Investments v. Elmer Contractors*,<sup>72</sup> May L. J. was still reluctant to recognise that an arbitrator had jurisdiction to rule on the initial existence of the contract, although arbitrators had jurisdiction to rule on the continued existence of contract.<sup>73</sup> However, he ruled that a dispute based on alleged mistake, misrepresentation or negligent misstatement at the time of concluding the contract arose in connection with the contract, and fell within the scope of the arbitration agreement.<sup>74</sup>

Bingham L.J. stated that rectification, misrepresentation and negligent misstatement were unlikely to raise questions more difficult than those arbitrators must resolve in dealing with the contents of contracts. Furthermore, privacy is more secure within an arbitral tribunal than it is in courts.<sup>75</sup>

In addition to the traditional explanation of the separability of an arbitration agreement based on logical consequence, this statement takes into account the special characteristics of arbitration.

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<sup>71</sup> Gross, Peter. “Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill.” *Arbitration International*. Vol. 11, No. 1, 1995: p. 85 at 95.

<sup>72</sup> *Ashville Investments v. Elmer Contractors*. [1988] 2 All ER 577.

<sup>73</sup> Id. at 582.

<sup>74</sup> Id. at 583.

<sup>75</sup> Id. at 599.

In 1991, in *Smith Ltd. v. H&S International*,<sup>76</sup> Steyn, J. stated: “Fortunately, our arbitration law is today in a more advanced state. Rescission, termination on the grounds of fundamental breach, breach of condition, frustration and subsequent invalidity of the contract, have all been held to fall within arbitration clauses.” Steyn, J. suggested that the evolution of the doctrine of separability must be considered. The right to arbitrate should only be denied if it is readily and immediately demonstrable that there is no arguable ground at all for disputing the claim.<sup>77</sup> This case also recognised the pragmatic development of the principle of the separability of an arbitration agreement.

In 1993, in *Harbour Assurance Ltd. v. Kansa General International Insurance Co. Ltd.*,<sup>78</sup> Ralph Gibson L. J. stated that an arbitration clause was usually considered to be a self-contained contract collateral to the main contract. It is self-contained because the question as to whether or not all the promises contained in the agreement were rendered invalid and void is a dispute arising out of the agreement.<sup>79</sup> At face value this statements seems sound: the principle of the separability of an arbitration agreement was recognised because an arbitration agreement is collateral to the main contract. There is, however, a paradox.

According to the Oxford English Dictionary, the term “collateral” means parallel.<sup>80</sup> Then, the principle of the separability of an arbitration agreement can be recognised, because it is parallel to the main contract. At the same time, the term “collateral” stands for situated or placed side by side or concomitant. Thus, an arbitration agreement is parallel to the main contract, but also situated side by side or concomitantly with it. In reality, an arbitration agreement is concomitant with the main contract. It is not independent of the main contract in a pure sense.

In one sense, the principle of the separability of an arbitration agreement is a legal fiction.<sup>81</sup> Indeed, the main contract and the arbitration agreement are closely connected to each other. Usually, the former contains the latter as an arbitration clause. Both are very often formed at the same place at the same time. It is quite natural that the arbitration agreement is concomitant to the main contract. The principle of the separability of an arbitration agreement is established as a legal fiction to solve disputes arising from the main contract.

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<sup>76</sup> *Smith Ltd. v. H&S International*. [1991] 2 QB (Com. Ct.) 127.

<sup>77</sup> Id. at 131.

<sup>78</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701.

<sup>79</sup> Id. at 714.

<sup>80</sup> “Collateral.” *Oxford English Dictionary*. Oxford: Clarendon Press, 1961: pp. 616-617.

<sup>81</sup> Gross, Peter QC. “Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill.” *Arbitration International*. Vol. 11, No. 1, 1995: p. 85 at 95.

This separability or independence of an arbitration agreement was explained as a result of the fact that it has the special characteristics of being self-contained. In *Harbour Assurance Ltd. v. Kansa General International Insurance Co. Ltd*<sup>82</sup>, although the contract was regarded as void *ab initio*, the arbitrator was held to have jurisdiction in view of the fact that the original arbitration clause gave him jurisdiction as to “all disputes arising out of the contract.”

As regards the question of the initial illegality, it was held that both the contract and the arbitration agreement are regarded as void if the making of such contracts is prohibited by statute.<sup>83</sup> Ralph Gibson L. J. reasoned that the judge should give effect to the wishes of the parties unless there are compelling reasons why it should not be referred to arbitration.<sup>84</sup>

After all, the logical explanation combined with practical considerations of expediency lead to the conclusion that the question as to whether or not all the promises contained in the agreement were invalid or void is a dispute arising out of the agreement.

### III-A-4. Under the Arbitration Act 1996

The principle of the separability of an arbitration agreement is now contained in Section 7 of the Arbitration Act 1996. Unlike some civil law countries such as Japan and Russia, the reason for separate classification of the main contract and the arbitration agreement has never been explored in England, because, under English law, they are not classified as different kind of contracts. However, reference has been made to the special characteristics of an arbitration agreement in order to explain the principle of the separability of an arbitration agreement. The establishment of a dispute resolution mechanism is regarded as collateral to the main contract and self-contained.

Section 7 of the Arbitration Act 1996 ('Separability of Arbitration Agreement') is, however, not a mandatory provision. Therefore, the following statement by Lord Macmillan in the case of *Heyman v. Darwins, Ltd.*<sup>85</sup> is valid: "It is clear that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract." Thus, parties can

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<sup>82</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701 at 714.

<sup>83</sup> *Id.* at 712.

<sup>84</sup> *Id.* at 710.

<sup>85</sup> *Heyman and Another v. Darwins, Ltd.* [1942] L.R. 357 at 371.

agree to void an arbitration agreement in the case of invalidity of the main contract.

In *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*,<sup>86</sup> an agreement to preserve the arbitration clause held to be void by reason of the nullification of the main contract was called an extraordinary arbitration clause.<sup>87</sup> The opposite now applies. An extraordinary arbitration clause must now be included in order that the principle of separability is not applied.

Thus, in England, although there are different explanations for the rationale underlying the acceptance of the principle of separability, it can be broadly concluded that the scope of the principle was widened on the basis of logical consequence. That is, even if the contract was repudiated, matters arising from the contract are still in existence, as is another ordinary contract, that is, the arbitration clause. However, the logic in support of the principle of separability is weakened when the dispute is about the initial non-existence of the main contract due to the rule “nothing can come of nothing; *ex nihil nil fit*.” Then, the explanation relates the principle of separability in practical expediency. With this development, it is assumed that the parties’ original wish was to refer disputes to arbitration irrespective of the problem with the main contract. The ultimate logic is that the question as to whether or not all the promises contained in the agreement were invalid or void is a dispute arising out of the agreement.

The separability of an arbitration agreement has been established as legal fiction on the basis of expediency. The Arbitration Act 1996 seems accept that separability is part of the positive legal norm theory so that a party can argue for separability when the invalidity of the main contract threatens to undermine the arbitration agreement.

## III-B. Assignment of an Arbitration Agreement

### III-B-1. As an Ordinary Contract

An arbitration agreement is classified as an ordinary contract in England. Traditionally, a contract could not be assigned. Under the Roman law, contractual rights were regarded as a legal chain or *juris vinculum* which connected particular contractors on particular issues and assignment of contractual rights were not permitted. Because of the influence of this principle, a contract was considered as

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<sup>86</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701.

<sup>87</sup> *Id.* at 711.



the parties' own relationship and transfer of contractual rights was originally not permitted in England.

This view was gradually changed. First, courts of equity recognised the transfer of contractual rights in the 17th Century. When the Judicature Acts 1873-75 brought an amalgamation of the English courts, assignment of contractual rights was generally recognised by statute. The common law did not recognise assignments of contractual rights in an action, but equity and statute did.<sup>88</sup>

Thus, assignment of contractual rights is, generally speaking, still regarded as a special case. Usually, most English contracts provide that they may not be assigned without the consent of the other party.

Since an arbitration agreement was classified as an ordinary contract, the position was the same. Traditionally, an arbitration agreement was regarded as a personal covenant and could not be transferred. It was once provided: "A submission is defined as a written agreement to submit present or future differences to arbitration. It is a personal covenant and cannot be assigned."<sup>89</sup>

### III-B-2. Concomitance of an Arbitration Agreement

Although an arbitration agreement is regarded as an ordinary contract in England, it has the special characteristics of being collateral to the main contract.<sup>90</sup> As mentioned in the previous section, collateral means parallel, but also situated side by side with the main contract. Therefore, the principle of the separability of an arbitration agreement is a legal fiction. The arbitration agreement is indeed concomitant with the main contract. Yet the principle of the separability of an arbitration agreement is based the agreement being independence from the main contract.

The following case illustrates the effect of an arbitration agreement being collateral to the main contract. In *Shayler v. Woolf*,<sup>91</sup> Lord Greene M.R. stated that if the contract was incapable of assignment, owing to its personal nature, there was no question that the arbitration agreement could not be assigned, but an arbitration agreement itself could be assigned.<sup>92</sup>

The right to assign under the arbitration agreement must be considered in the

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<sup>88</sup> Keenan, Denis. *Smith & Keenan's English Law*. London: Pitman Publishing, 1995: p. 496.

<sup>89</sup> Cave, Edmund and Wetton, Ernest. *Russell on the Power and Duty of an Arbitrator*, 13th ed. London: Stevens and Sons, Ltd., 1935: p. 46.

<sup>90</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701 at 711.

<sup>91</sup> *Shayler v. Woolf*. [1946] Ch. 320.

<sup>92</sup> *Id.* at 322-323.

context of the right to assign under the main contract. In the case of assignment of the main contract by the operation of law, that is, in the case of death and bankruptcy, the successor must accept the rights and obligations relating to the arbitration agreement.<sup>93</sup> Section 8 (1) of the Arbitration Act 1996 provides that unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by the personal representatives of the party.

In the case of general assignment of contractual rights, there are several possibilities. If a *Scott v. Avery* clause is inserted in the arbitration agreement, rights and obligations relating to the arbitration agreement do not transfer to the assignee and the claim must be pursued by arbitration between the original parties.<sup>94</sup> This was argued in *Dennehy v. Bellamy*.<sup>95</sup> The Court of Appeal ruled that the assignee of the rights under the main contract had no substantive rights until the condition (referred to as the *Scott v. Avery* clause) was performed between the original parties.

If legal assignment of rights under the main contract is made pursuant to the Law of Property Act 1925, the assignee should succeed to rights and obligations relating to the arbitration agreement. Section 136 provides that the assignment of a legal thing in action, of which express notice in writing has been given to the debtor, is effectual in law to pass and transfer from the date of notice (a) the legal right to such debt or thing in action and (b) all legal and other remedies for the same.<sup>96</sup>

This provision is wide enough to include the rights and obligations relating to an arbitration agreement.<sup>97</sup> In *Cottage Club Estates v. Woodside Estate Co. (Amewsham)*,<sup>98</sup> where the defendant had assigned the money due under the contract to third parties, the award in his favour was not upheld. Wright J. suggested that:

"The arbitrator cannot close his eyes to the fact that the claimant, who came to him for an award that he was entitled to recover moneys from the respondent, had in fact assigned those money away by valid legal assignment (by virtue of Section 136 of the Law of Property Act 1925) to some third party who is not before the arbitrator, and who is not a party to the arbitration or to the arbitration."<sup>99</sup>

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<sup>93</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England. London: Butterworths, 1989: p. 137.

<sup>94</sup> *The "Pandre Island"* [1984] 2 Lloyd's Rep. 408.

<sup>95</sup> *Dennehy v. Bellamy* [1938] Lloyd's Rep. Vol. 60, 269.

<sup>96</sup> Law of Property Act, 1925. 15 Geo. 5. CH. 20.

<sup>97</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England. London: Butterworths, 1989: p. 137, footnote 7.

<sup>98</sup> *Cottage Club Estates v. Woodside Estate Co. (Amewsham)* [1928] 2 KB 463.

<sup>99</sup> *Id.* at 468.

In *Aspell v. Seymour*,<sup>100</sup> the Court of Appeal recognised the right to request a stay of the proceedings made by the assignee of rights under the main contract. In this case, the assignment was firmly accepted as valid. Lord Hanworth M.R. stated that the right to stay legal proceedings under an arbitration claim should arise not only as between the parties but also as between assignees as persons claiming through the original parties, based on Section 4 of the Arbitration Act 1889.<sup>101</sup> This provision was replaced by Section 4(1) of the Arbitration Act 1950 and Section 1(1) of the Arbitration Act 1975. These cases deviated from the traditional view that an arbitration agreement could not be assigned.

In so far as an arbitration agreement is collateral to the main contract, as mentioned in *Harbour Assurance Ltd. v. Kansa General International Insurance Co. Ltd.*,<sup>102</sup> an arbitration agreement should not be assigned when the main contract is assigned, because it is an independent contract according to the principle of separability. However, in nature, an arbitration agreement is concomitant to the main contract. The principle of the separability of an arbitration agreement is merely a legal fiction. There is a basic principle under the common law that the arbitration agreement can be assigned with the assignment of the main contract.<sup>103</sup>

In *Jordan Nicolov*,<sup>104</sup> there was a disagreement as to whether or not the insurer, who had paid compensatory damages for the shipowners, could replace the ship owner in the arbitration with the charterers when arbitration had already been commenced. The commercial court decided on a basic rule of assignment, that notice must be given not only to the other party but also to the arbitrators, for the assignment to take full legal effect. As regards the relationship between the parties and the arbitrators, Justice Hobhouse stated that arbitrators were not chosen because of any special relationship to that party. Arbitrators must be impartial and disinterested.<sup>105</sup> Therefore, in this case assignment was recognised even after the

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<sup>100</sup> *Aspell v. Seymour* [1929] WN 152.

<sup>101</sup> Section 4 of the Arbitration Act 1889 provided that "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings".

<sup>102</sup> *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.* [1993] Q.B. 701 at 711.

<sup>103</sup> Merkin, Robert. *Arbitration Act 1996: An Annotated Guide*. London: LLP, 1996: p. 117.

<sup>104</sup> The "*Jordan Nicolov*." [1990] 2 Lloyd's Rep. 11.

<sup>105</sup> *Id.* at 16.

arbitration had been commenced by the assignor and the other party.

### III-B-3. Under the Arbitration Act 1996

Section 82(2) provides that a party to an arbitration agreement includes any person claiming under or through a party to the agreement. This provision follows Section 4(1) of the Arbitration Act 1950 and Section 1(1) of the Arbitration Act 1975. As mentioned above, the original provision was Section 4 of the Arbitration Act 1889, based on which, in *Aspell v. Seymour*,<sup>106</sup> the Court of Appeal recognised the claim to stay the proceedings made by the assignee of rights under the main contract.

In *Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines, The League*,<sup>107</sup> the Commercial Court concluded again that an assignee of the contractual rights claim against the debtor, "under" or "through" the assignor, was subject to the arbitration agreement.<sup>108</sup> Thus, an assignee of a party's rights under a main contract containing an arbitration clause is bound by the arbitration clause.

The assignee must notify the other party. In *Baytur S. A. v. Finagro Holding S. A.*, the Court of Appeal stated that the minimum obligation of the assignee was to give notice to the other side and to submit to the jurisdiction of the arbitrators in the case of assignment.

The Consultation Document of the Arbitration Act 1996 stated that the principle of the separability of an arbitration agreement does not influence the question whether an assignment of rights under the substantive agreement carries with it the rights and obligations relating to an arbitration agreement.<sup>109</sup> It seems that this statement supports the theory that an arbitration agreement is concomitant to the main contract. Though the principle of the separability of an arbitration agreement allows for the separation of the agreement from the main contract, the arbitration agreement can be assigned with the assignment of the main contract because it is concomitant to the main contract.

## III-C. Kompetenz-Kompetenz

### III-C-1. Relationship with Classification of an

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<sup>106</sup> *Aspell v. Seymour* [1929] WN 152.

<sup>107</sup> *Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines, The League*. [1984] 2 Lloyd's Rep. 259.

<sup>108</sup> *Id.* at 259-260.

<sup>109</sup> "Department of Trade and Industry Consultation Document." *Arbitration International* Vol. 10, No. 2, 1994: p.228.

## Arbitration Agreement

Mustill once stated: "Common sense demands that any obvious objection to the jurisdiction should be dealt with at an early stage, in order to spare both the arbitrator and the parties the waste of time and money involved in conducting a reference which ultimately proves to be a nullity."<sup>110</sup> It is unanimously agreed that the arbitration tribunal has power to rule on its own jurisdiction, or competence to decide upon its own competence.<sup>111</sup> This principle is generally recognised on the Continent as *Kompetenz-Kompetenz*.

One possible reasoning of the establishment of the principle of separability of an arbitration agreement relates to classification of an arbitration agreement as an ordinary contract. Even if the contract was repudiated, matters arising from the contract are still in existence, as is another ordinary contract, that is, the arbitration clause. When the principle of the separability of an arbitration agreement is accepted, irrespective of any doubt about the existence or invalidity of the main contract, an arbitration agreement is nevertheless regarded as valid, and consequently, the competence of an arbitral tribunal to deal with disputes is secured. In this sense, the principle of the separability of an arbitration agreement has nothing to do with the principle of *Kompetenz-Kompetenz*, which deals with challenges to the jurisdiction of the arbitral tribunal.<sup>112</sup> In so far as arbitral proceedings are continued on the basis of this competence without a challenge on the basis of jurisdiction, the arbitral tribunal can continue its proceedings on the assumption that it has the competence to do so.

It is, however, very likely that a challenge to the jurisdiction of the arbitral tribunal will be made when the issue of the separability of an arbitration agreement comes into question, because there may be doubt about the existence or validity of the contract and consequently the arbitration agreement. Thus, an argument based on the separability of an arbitration agreement is very likely to be raised at the same time as one based on the principle of *Kompetenz-Kompetenz*. There is indirect relationship among classification of an arbitration agreement as an ordinary contract, the principle of separability of an arbitration agreement and the principle of *Kompetenz-Kompetenz*.

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<sup>110</sup> Mustill, Michael J. and Boyd, Stewart C. The Law and Practice of Commercial Arbitration in England. London: Butterworths, 1989: pp. 574-575.

<sup>111</sup> David, René. Arbitration in International Trade. London: Kluwer Law and Taxation Publishers, 1985: p. 285; Redfern, Alan and Hunter, Martin. Law and Practice of International Commercial Arbitration, 2nd ed. London: Sweet & Maxwell, 1991: p. 276.

<sup>112</sup> Gross, Peter. "Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill." Arbitration International. Vol. 11, No. 1, 1995: p. 85 at 86.

The UNCITRAL Model Law clearly put together the principle of separability of an arbitration agreement and the principle of Kompetenz-Kompetenz. Article 16(1) provides that the arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Thus, although the Arbitration Act 1996 does not state this as clearly as the UNCITRAL Model Law does, the principle of the separability of an arbitration agreement and the principle of Kompetenz-Kompetenz are still closely connected.

### III-C-2. Scope of Jurisdiction

The jurisdiction of an arbitral tribunal is determined by an arbitration agreement. Its scope of jurisdiction is determined by the arbitral tribunal, the jurisdiction of which is determined by an arbitration agreement... This is a circular argument that must be stopped at some point. The basic principle in England is that the question as to whether or not an arbitrator acts within his or her jurisdiction is determined by courts,<sup>113</sup> although the scope of the jurisdiction of an arbitration agreement is determined by the arbitral tribunal. Therefore, arbitrators do have the power to rule on their own jurisdiction, but any such ruling if made is provisional only and can be challenged in the English Courts.<sup>114</sup>

The reasoning behind the principle of Kompetenz-Kompetenz was outlined in *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer*.<sup>115</sup> Devlin J. stated that it would be merely a waste of time if the jurisdiction of the arbitral tribunals had to be determined by courts whenever the matter of jurisdiction arose as a preliminary matter.<sup>116</sup>

In the 1977 case of *Willcock v. Pickfords*<sup>117</sup>, however, the principle of Kompetenz-Kompetenz was totally dismissed. Lord Justice Roskill stated:

"An arbitrator cannot decide his own jurisdiction.  
Therefore whenever a question arises whether or not  
there has been a submission to arbitration, an arbitrator

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<sup>113</sup> *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.* [1923] AC 480 at 488.

<sup>114</sup> Gross, Peter "Competence of Competence: An English View." *Arbitration International*. Vol. 8, No. 2, 1992: p. 205 at 207.

<sup>115</sup> *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer* [1954] 1 QB 8.

<sup>116</sup> *Id.* at 12-13.

<sup>117</sup> *Willcock v. Pickfords* [1977] 1 Lloyd's Rep. 244.

cannot in English law decide that issue. The only tribunal to decide it is the Court, and that is one of the issues the plaintiff wants the Court to decide."<sup>118</sup>

Nevertheless, it is generally understood that this statement does not prevent the arbitral tribunal from ruling on its own jurisdiction.<sup>119</sup> Furthermore, the arbitration agreement would now be categorised as a consumer arbitration agreement falling under the Consumer Arbitration Agreements Act 1988.<sup>120</sup>

In *Dalmia v. National Bank*,<sup>121</sup> the Court of Appeal decided that Indian law, which was treated as the same as English law for these purposes, would not allow an arbitrator to make the final decision on his own jurisdiction. This case was in line with the general rule that arbitrators can determine their own jurisdiction, but that decision cannot be final.

This general rule must be the natural result of the traditional principle that an arbitration agreement cannot oust the jurisdiction of the courts. Arbitration was recognised as a 'pre-condition' of court proceedings.<sup>122</sup> The power of an arbitral tribunal to determine its own competence was recognised simply because it would be very inconvenient if there was not such a power.

### III-C-3. Under the Arbitration Act 1996

The Arbitration Act 1996 clearly embraces this idea. Section 30(1) provides that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement. The issue of the validity of an arbitration agreement is clearly included.

Although the provision of the right to object to the substantive jurisdiction of tribunal (Section 31) is mandatory, the provision on competence of a tribunal to rule on its own jurisdiction (Section 30) is not mandatory under the Arbitration Act 1996. Therefore, the parties can agree to deprive the arbitral tribunal of this competence.

Section 30(2) provides that any decision of an arbitral tribunal on its own jurisdiction may be challenged by any available arbitral process of appeal or review.

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<sup>118</sup> Id. at 245.

<sup>119</sup> Gross, Peter. "Competence of Competence: An English View." *Arbitration International*. Vol. 8, No. 2, 1992: p. 205 at 209.

<sup>120</sup> Gross, Peter. "Competence of Competence: An English View." *Arbitration International*. Vol. 8, No. 2, 1992: p. 205 at 209.

<sup>121</sup> *Dalmia v. National Bank* [1977] 2 Lloyd's Rep. 223.

<sup>122</sup> *Alexander Scott v. George Avery* (1856) 5 HLC 811; 10 ER 1121.

For example, a challenge may be made in the process of appeal regarding the arbitral award (Section 67). Thus, Kompetenz-Kompetenz is subject to court review in England.

There are two possible times that an arbitral tribunal may be required to determine its own competence: either before the court issues a decision or afterwards. If an arbitral tribunal is required to examine its own competence before the court issues a decision on this matter, as is usually the case, the arbitral tribunal should use its discretion to determine its own competence.

There is a possibility that the arbitral tribunal will be required to determine its own competence after the court has decided it. At the stay of court proceedings there may have been a dispute on the basis of the existence of an arbitration agreement. Then, an arbitral tribunal must examine its own competence, independent from the court decision, because in England the court can only stay proceedings.

Section 9(1) of the Arbitration Act 1996 provides that a party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter claim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings related to that matter. Thus, courts cannot enforce specific performance of an arbitration agreement. Instead, the court can indirectly force parties to participate in the arbitration by refusing a court settlement, which leaves a party in the position of having no other remedy than to proceed by arbitration.<sup>123</sup>

Thus, the Arbitration Act 1996 allows simply for a stay of court proceedings, unlike under the UNCITRAL Model Law under which courts refer the parties to arbitration. In theory, in England, a court may stay proceedings because it has no interest to hear the dispute, not because it concludes that an arbitrator should hear the dispute on the basis that it has the competence to do so. An arbitral tribunal can then examine its own competence, independent from the court decision, although it had better follow the court decision, because decisions based on the principle of Kompetenz-Kompetenz is eventually subject to court review.

If so, courts should refer the parties to arbitration, and it should be made a legal requirement that an arbitral tribunal should follow the court decision, at least in respect of the validity of an arbitration agreement and whether the same dispute falls within the arbitration agreement. As mentioned above, in *Heyman v. Darwins*, Lord Macmillan explained that the first thing for a court is to identify the precise nature of

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<sup>123</sup> *Doleman & Sons v. Ossett Corporation*. [1912] 3 KB 257 at 268-269.



the dispute, and the second thing is to determine whether or not the dispute falls within the terms of the arbitration agreement.<sup>124</sup> Arbitration should follow this decision. However, in most cases, courts should refer disputes to arbitration rather than fully examine the validity of an arbitration agreement. This will be argued in the following sections.

### III-C-4. Time-Limit for Objection to Arbitral Tribunal's Decision on its Own Competence

The separability of an arbitration agreement is recognised on the basis of the logical consequence of classification of an arbitration agreement into an ordinary contract or assumption of the parties' original wish, as mentioned above. There are many variations of interpretation in England. The scope of recognition of the separability of an arbitration agreement has been widened. "The wider the doctrine of autonomy (separability), the more limited the circumstances when the arbitrator is called upon to examine his own decision."<sup>125</sup>

Courts respect the parties' original wish and stay court proceedings if a party asks for this on the basis of the existence of an arbitration agreement. Since it is based on the parties' wish, courts reject the stay when the party makes any attempt to defend the claims on its merits. Respecting the parties' original wish, courts can recognise the stay unless the party responds on the merits of the dispute. Then an arbitral tribunal is required to examine its own competence. As regards *Kompetenz-Kompetenz*, there is a trend in favour of arbitration rather than retaining a superior position for courts, because it would be convenient that arbitral tribunals determined their own competence. Otherwise, courts are always required to examine the jurisdiction of the arbitral tribunal whenever the matter of jurisdiction arises as a preliminary issue.<sup>126</sup>

Although there is a basic principle that arbitrators do have the power to rule on their own jurisdiction, any such ruling if made is provisional only and can be challenged in the English Courts.<sup>127</sup> The problem is now how to limit the court intervention. This can be achieved by setting a time-limit for objection to the arbitral tribunal's decision on its own competence.

Section 31(1) of the Arbitration Act 1996 provides that an objection to the

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<sup>124</sup> *Heyman v. Darwins* [1942] A.C. 356 at 370.

<sup>125</sup> Gross, Peter. "Competence of Competence: An English View." *Arbitration International*. Vol. 8, No. 2. 1992: p. 205 at 208.

<sup>126</sup> *Id.* at 12-13.

<sup>127</sup> *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer* [1954] 1 QB 8.

jurisdiction of the arbitrator must be raised by a party not later than the time he or she initiates or responds to any challenges on the merits. However, the right to object is not lost because the party has appointed an arbitrator.

Any objection regarding excess of jurisdiction during the proceedings must be made as soon as possible after the matter is raised (Section 31(2)). The arbitrator may admit a late objection only if he or she considers the delay justified (Section 31(3)). If a party continues to take part in the arbitral proceedings without objection, he or she may not raise that objection later before the tribunal or the court (Section 73(1)).

The parties can determine how the arbitral tribunal decides the matter. In the absence of the party's agreement, the arbitral tribunal may either decide on the matter in a preliminary award or its final award on the merits (Section 31 (4)). Both the awards are regarded as full awards and can be challenged under Section 67.<sup>128</sup>

The possibility of the courts intervening to rule on the jurisdiction of arbitrators during the arbitral proceedings is limited only when both parties so agree (Section 32(2)(a)). If the parties do not agree, the tribunal must decide whether to give its permission for an application to the court (Section 32(2)(b)).

Thus, recently, the opportunity to make an objection to the arbitral tribunals' decision on its own competence has been very limited. Although Kompetenz-Kompetenz is eventually subject to court review, there is a trend in England in favour of arbitration rather than retaining a superior position for courts.

### III-C-5. The Issue of Validity of an Arbitration Agreement

As previously stated, the basic principle in England is that the question as to whether or not an arbitrator acts within their jurisdiction is determined by courts.<sup>129</sup> The scope of the jurisdiction of an arbitration agreement is determined by the arbitral tribunal, however the question as to whether or not an arbitrator acts within his jurisdiction is determined by courts.<sup>130</sup>

In harmony with this basic principle, Section 30(1) of the Arbitration Act 1996 clearly provides that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters

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<sup>128</sup> Merkin, Robert. *Arbitration Act 1996: an Annotated Guide*. London: LLP, 1996: p. 54.

<sup>129</sup> *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.* [1923] AC 480 at 488.

<sup>130</sup> Gross, Peter "Competence of Competence: An English View." *Arbitration International*. Vol. 8, No. 2, 1992: p. 205 at 207.

have been submitted to arbitration in accordance with the arbitration agreement. The issue of the validity of an arbitration agreement is clearly included.

Although it has been largely ignored by commentators, this is a highly controversial issue. Strictly speaking, although the scope of jurisdiction is argued in terms of *Kompetenz-Kompetenz*, the validity of an arbitration agreement, the most basic problem, is not considered under the traditional basic principle of *Kompetenz-Kompetenz*.

Under the recently articulated principle of the separability of an arbitration agreement, the validity of an arbitration agreement can be strongly secured. In so far as the initial non-existence of the main contract falls within the scope of an arbitration agreement, there are only a few possibilities that the validity of an arbitration agreement will be denied.

Only in the following two instances is there a dispute as to the validity of an arbitration agreement. First, where public policy requires that the arbitration agreement should be struck down together with the main contract. Second, where the parties to an arbitration agreement do not have the capacity to enter into an arbitration agreement.

Thus, under the principle of separability, there is a strong presupposition that there is a valid arbitration agreement. As a result, the main issue in terms of the *Kompetenz-Kompetenz* is the scope of jurisdiction. The interim existence of the valid arbitration agreement is presupposed, and the issue of the validity of an arbitration agreement is unlikely to be the main issue under the principles of separability of an arbitration agreement and *Kompetenz-Kompetenz*.

This points to some logical contradiction in terms of the relationship between the principle of the separability of an arbitration agreement or *Kompetenz-Kompetenz* and the stay of court proceedings on the basis of an arbitration agreement. This will be discussed in the following Section.

## III-D. Stay of Court Proceedings

### III-D-1. Relationship with Classification of an Arbitration Agreement

One of reasons for the establishment of the principle of the separability of an arbitration agreement is classification of an arbitration agreement as an ordinary contract. Even if the main contract is invalid, there are still problems of future liabilities under it. The contract itself is then still in existence, and, with it, another ordinary contract, the arbitration clause. The principle of the separability of an

arbitration agreement also assumes the existence of a valid arbitration agreement, which secures the competence of the arbitral tribunal to deal with disputes, and to examine its own competence, if the party objects to the jurisdiction. This leads to the principle of *Kompetenz-Kompetenz*.

Thus, the principle of the separability of an arbitration agreement has a close connection with the principle of *Kompetenz-Kompetenz*. Both the principles strongly assume, although temporarily, the existence of a valid arbitration agreement. However, when the court proceedings have commenced and the stay has been asked for by the party, the effects of these principles are all denied.

Section 9(4) of the Arbitration Act 1996 provides that on application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Thus, once, the court proceedings are commenced and the stay is asked for by the party, the court fully examines the validity of an arbitration agreement. The special characteristics of an arbitration agreement such as the principle of separability and *Kompetenz-Kompetenz* are all ignored, and the validity of the arbitration agreement is examined as an ordinary contract. Certainly, an arbitration agreement is classified as an ordinary contract in England.

## III-D-2. Historical Perspective

### III-D-2-a. Traditional View

Section 7 of the Arbitration Act 1996 fully embraced the principle of the separability of an arbitration agreement. The separability of an arbitration agreement can be insisted upon by the assignee of the arbitration agreement. Consequently, the parties to an arbitration agreement can ask the court to stay proceedings on the ground of the existence of an arbitration agreement when the other party commenced court proceedings.

The case of *Scott v. Avery*<sup>131</sup> confirmed that parties cannot by contract oust the courts of their jurisdiction but any person may covenant that no right of action shall accrue till a third person has decided on any difference between himself and the other party to the covenant. Arbitration was recognised as a pre-condition of court proceedings. The court would, therefore, stay proceedings on the grounds of the existence of an arbitration agreement. Although arbitration is the pre-condition for court proceedings, losing the right to call for arbitration does not mean to losing the

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<sup>131</sup> *Alexander Scott v. George Avery* (1856) 5 HLC 811; 10 ER 1121.

right to call for court proceedings.<sup>132</sup>

Traditionally, however, English courts were not willing to recognise the stay, because there was a basic principle that an arbitration agreement could not oust the jurisdiction of the courts. In 1912, in *Doleman & Sons Ltd. v. Ossett Corporation*,<sup>133</sup> Farwell L.J. stated that, provided that the party did not ask the court for a stay of proceedings, recognition of the bar to proceedings on the basis of the existence of the award is inconsistent with the dignity of the court. The courts did not compete with arbitrators, and once court proceedings were commenced, the parties could not withdraw without the decision or leave of the court or the consent of the opponent.<sup>134</sup>

Regarding the status and dignity of the court as compared to the arbitral tribunal, the former has traditionally had a superior position, because the courts have served as the ultimate forum for resolving disputes in society. This trend was largely reversed in *Bremer Vulkan v. South India*,<sup>135</sup> where the arbitrator's power to dismiss an arbitration for want of prosecution was not recognised. The court strongly supported the arbitrator's power to make an award on the merits based on available materials.<sup>136</sup>

### III-D-2-b. Under the Arbitration Act 1996

Section 9 of the Arbitration Act 1996 has abolished the distinction as regards domestic arbitration. Section 86 of the Arbitration Act 1996 provides that Section 9 does not apply to a domestic arbitration agreement, although, especially in connection with other EU nationals, a different treatment of an arbitration agreement may be contrary to the Treaty of Rome. Therefore, this provision is a transitional one and can be repealed by the Secretary of State (Section 88 of the Arbitration Act 1996).

Although it was not concerned with this exact issue, there has been a case which decided a similar issue. In *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* (the *PASF* case),<sup>137</sup> the Court of Appeal determined that discriminatory treatment as regards domestic and international arbitration in the Consumer Arbitration Agreements Act 1988 constituted a restriction on the freedom to provide services to nationals of other member states of the EC, was contrary to

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<sup>132</sup> *Central Meat Products Company, Ltd. v. J. V. McDaniels, Ltd.* [1952] 1 Lloyd's Rep. 562.

<sup>133</sup> *Doleman & Sons v. Ossett Corporation*. [1912] 3 KB 257.

<sup>134</sup> *Id.* at 274.

<sup>135</sup> *Bremer Vulkan v. South India*. [1981] 1 Lloyd's Rep. 253.

<sup>136</sup> *Id.* at 254.

<sup>137</sup> *Phillip Alexander Securities & Futures Ltd. v. Bemberger and Others* [1996] Times, 22nd July 1996, 448; UK Legal Lexis Current Awareness, Halsbury's Laws of England-Monthly Review.

Article 59 and amounted to unlawful discrimination contrary to Article 6 of the EC Treaty. On the basis of this judgement, Section 9 will be applied to both domestic and international arbitration agreements.

In *Heyman v. Darwins*, Lord Macmillan explained the way to examine the issue of the principle of separability in the case of examination of a stay on the grounds of the existence of an arbitration agreement. The first thing a court must do is to identify the precise nature of the dispute. Secondly, it must examine whether or not the dispute falls within the terms of the arbitration agreement. Finally, the court must consider whether there is any sufficient reason why the dispute should not be referred to arbitration.<sup>138</sup>

Section 9(4) of the Arbitration Act 1996 follows this approach. It provides that on application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Thus, a court must fully examine the validity of an arbitration agreement in order to grant a stay. As mentioned in the previous Part II, this is very likely to raise a competition of international jurisdiction if the other party asks for an injunction from the court of the country which the arbitration agreement indicates as the seat of arbitration. The way this problem can be solved will be discussed in the conclusion.

In order to effect a stay, the English court cannot enforce specific performance of an arbitration agreement. Instead, the court can indirectly force participation in arbitration by refusing settlement by the court, which leaves a party in the position of having no other remedy than to proceed by arbitration.<sup>139</sup> As mentioned above, this principle was embraced by the Arbitration Act 1996. Section 9(1) of the Arbitration Act 1996 provides that a party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter claim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings relative to that matter. The party who applies for the stay must be the one who is sued.<sup>140</sup>

In contrast, Article 8 of the UNCITRAL Model Law provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it

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<sup>138</sup> *Heyman v. Darwins* [1942] A.C. 356 at 370.

<sup>139</sup> *Doleman & Sons v. Ossett Corporation*. [1912] 3 KB 257 at 268-269.

<sup>140</sup> *Eiri Fans Ltd. v. NMB Ltd.* [1987] 2 All ER 763.

finds that the agreement is null and void, inoperative or incapable of being performed. Thus, the Arbitration Act 1996 provides simply for a stay of court proceedings, while the UNCITRAL Model Law refers the parties to arbitration.

### III-D-3. Stay under Other Conditions

A party can apply for a stay of legal proceedings in cases where some other condition for arbitration has not been completed. In *Channel Group v. Balfour Beauty Ltd. (H.L.(E.))*,<sup>141</sup> valuation of a later variation by a panel of experts was a pre-condition for arbitration. The House of Lords decided that the court had a power to stay legal proceedings based on an alternative dispute resolution, whether or not it amounted to an arbitration agreement under Section 1 of the Arbitration Act 1975.

In *Cott UK Ltd. v. F E Barber Ltd.*<sup>142</sup> the arbitration agreement provided that any dispute or difference arising from the construction or performance of the agreement should be referred to a person to be appointed by the Director General of the British Soft Drinks Association. The person appointed was to be an independent consultant and was to act as an expert, not as an arbiter, and his decision was to be final and binding on the parties. When the plaintiffs brought an action to the court on the ground that the Association was not an appropriate forum for the claim, the defendant issued a summons to stay the action based on the arbitration agreement. Arguments were led as to whether or not a party can ask the court to stay proceedings based on alternative dispute resolutions such as expertise determination. Judge Hegarty stated that a dispute resolution agreement did not oust the jurisdiction of the court, but at most conferred on the court the power to stay proceedings, so as to indirectly compel the parties to go to that alternative forum.<sup>143</sup> In this case, the Queen's Bench Division at Liverpool refused the stay on the ground that the appointed person would not appear to have any relevant expertise. There is a strong trend in favour of recognising a stay of court proceedings based on alternative dispute resolution in England.

### III-D-4. Time-Limit of Request of Stay

The basic principle is that any application to stay legal proceedings must be made before any steps have been taken in the action. Section 9(3) of the Arbitration Act 1996 provides that an application may not be made after the party has taken any

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<sup>141</sup> *Channel Group v. Balfour Beauty Ltd. (H.L.(E.))*. [1993] AC 334.

<sup>142</sup> *Cott UK Ltd. v. F E Barber Ltd.* [1997] 3 All ER 540.

<sup>143</sup> *Id.* at 550.

step in the action to answer the substantive claim. This is in line with the decision in *Elefanten Schuh GmbH v. Pierre Jacqmain*<sup>144</sup> in the European Court of Justice. This decision was applied in determining whether lodging a defence constituted any step in the action in the *Atlantic Emperor* case.<sup>145</sup>

Once legal proceedings are brought against a party, one party must make an application to stay the legal proceedings before the court. In *Pitchers, Ltd. v. Plaza, Ltd.*,<sup>146</sup> the court did not stay the proceedings, although there was an exchange of notices mentioning arbitration, because the defendant had asked the master for leave to quote their affidavit to defend the action.

The important question is then what constitutes a step in the action to answer the substantive claim. Section 9(3) uses more general terms than draft versions.<sup>147</sup> Therefore, the meaning of the terms should be interpreted widely. However, since the term “substantive claim” is used, mere expression of a desire for a statement of claim is not a step in the proceedings.<sup>148</sup>

The party can make an application for a stay before making any attempt to defend the claim on its merits. In this sense, the decision in *County Theatres and Hotels, Ltd. v. Knowles*<sup>149</sup> must be regarded as no longer authoritative. In this case, the defendant’s appearance in a hearing of summons for direction was regarded as a step in the action. The decision in *Turner & Goudy v. McConnell*<sup>150</sup> also now comes into question. In this case, the claim for adjournment of the proceedings before the master for the summary judgement was regarded as taking a step in the action.

The party’s lack of awareness of the arbitration clause at the moment of making the statement of claim in the court does not recover the right to an application for stay.<sup>151</sup> This decision shows a clear contrast with decisions in Japan, because arbitration is not a popular method of dispute settling in Japan.

### III-D-5. Contradiction with the Principles of Separability and Kompetenz-Kompetenz

#### III-D-5-a. Court and Arbitration

It has already been discussed that traditionally, English courts were not

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<sup>144</sup> *Elefanten Schuh GmbH v. Pierre Jacqmain*. [1981] ECR Case 150/80.

<sup>145</sup> *Atlantic Emperor (No. 2)*. [1992] 1 Lloyd’s Rep. 624.

<sup>146</sup> *Pitchers, Ltd. V. Plaza, Ltd.* [1940] 1 All ER 151.

<sup>147</sup> Merkin, Robert. *Arbitration Act 1996: an Annotated Guide*. London: LLP, 1996: p. 25.

<sup>148</sup> *Parker, Gaines & Co. Ltd. V. Turpin*. [1918] 1 KB 358 at 360.

<sup>149</sup> *County Theatres and Hotels, Ltd. v. Knowles*. [1902] 1 KB 480.

<sup>150</sup> *Turner & Goundy v. McConnell*. [1985] 2 All ER 34 at 38.

<sup>151</sup> *Parker, Gaines & Co. Ltd. V. Turpin*. [1918] 1 KB 358 at 360.



willing to grant a stay of proceedings on the basis of an arbitration agreement because there was a basic principle that such an agreement could not oust the jurisdiction of the courts. Naturally, courts had a superior position in terms of status and dignity, because the courts served as the ultimate method of resolving disputes in society. Developments in case law and the Arbitration Act 1996 have largely reversed this trend. Recently, courts have stayed proceedings if there is an arbitration agreement.

In reality, however, courts are still not entirely sympathetic to arbitration. In *Heyman v. Darwins*, Lord Macmillan explained the way to examine the principle of separability in the 1940's in the case of examination of a stay on the grounds of the existence of an arbitration agreement. The first thing for a court is to identify the precise nature of the dispute. Secondly, it must examine whether or not the dispute falls within the terms of the arbitration agreement. Finally, the court must consider whether there is any sufficient reason why the dispute should not be referred to arbitration.<sup>152</sup> Thus, the question was the scope of an arbitration agreement, and there was at least an assumption that a valid arbitration agreement existed.

The rationale for the separability of an arbitration agreement is that an arbitration agreement is regarded as valid even if the main contract is invalid. Irrespective of whether the main contract is valid, the very existence of an arbitration agreement secures the competence of the arbitral tribunal, on the basis of which it can examine its own competence if the party requests it to do so.

Thus, the principle of the separability of an arbitration agreement and the principle of Kompetenz-Kompetenz strongly assume, although temporarily, the existence of a valid arbitration agreement. However, when the court proceedings have commenced and the stay has been asked for by the party, this effect of these principles is denied. Section 9(4) of the Arbitration Act 1996 provides that on application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

Over a number of years a legal fiction was established that the validity of an arbitration agreement is strongly assumed under the principle of separability. In terms of the principle of Kompetenz-Kompetenz, the scope of jurisdiction of an arbitration agreement should be the main issue. However, Section 9(4) of the Arbitration Act 1996, ignores this fiction and courts must now examine all issues including the validity of an arbitration agreement.

Court proceedings may be commenced, for example, on the basis of a belief

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<sup>152</sup> *Heyman v. Darwins* [1942] A.C. 356 at 370.

that there is no arbitration agreement, oversight of an arbitration agreement or delay dispute resolutions, whether court proceedings or arbitration. Whatever the reason, once court proceedings are commenced, courts must examine all basic issues if a stay is asked for by the party. This is clearly provided by not only Section 9(4) of the Arbitration Act 1996, but also Article II (3) of the 1958 New York Convention and Article 8 (1) of the UNCITRAL Model Law. This contradicts with the principles of the separability of an arbitration agreement and Kompetenz-Kompetenz. Harmonisation would be desirable.

### III-D-5-b. Harmonisation between the Principle of Separability or Kompetenz-Kompetenz and Stay of Court Proceedings

There is a clear reason why arbitration should first be used to determine most disputes in so far as there is an arbitration agreement. In 1991, in *Smith Ltd. v. H&S International*,<sup>153</sup> Steyn, J. stated: “Fortunately, our arbitration law is today in a more advanced state. Rescission, termination on the ground of fundamental breach, breach of condition, frustration and subsequent invalidity of the contract, have all been held to fall within arbitration clauses.” Steyn, J. explained that the evolution of the doctrine of separability must be considered. The right to arbitrate should only be denied if it is readily and immediately demonstrable that there are no arguable grounds at all for disputing the claim.<sup>154</sup>

On the other hand, there is also a strong reason why courts should determine crucial issues in terms of the issue of the stay of court proceedings. Under the UNCITRAL Model Law, it was felt that all issues should be settled by the court before referring the parties to arbitration, and the Working Group of the UNCITRAL Model Law refused to add the term “manifestly” before “null and void.”<sup>155</sup> Therefore, courts must carefully examine the validity of an arbitration agreement, whether there seem to be a valid arbitration agreement or manifest evidence for nullity of the arbitration agreement.

There is also an opinion that the words in the Model Law correspond to Article II (3) of the 1958 New York Convention, and the invalidity of an arbitration agreement should be accepted only in cases where the invalidity is manifest.<sup>156</sup> As a

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<sup>153</sup> *Smith Ltd. v. H&S International*. [1991] 2 QB (Com. Ct.) 127.

<sup>154</sup> *Id.*, at 131.

<sup>155</sup> Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994: p. 303.

<sup>156</sup> Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: p. 155.

result, courts should only check whether or not there is evidence for manifest invalidity of the arbitration agreement rather than carefully check the validity of the arbitration agreement.

Section 9(4) of the Arbitration Act 1996 provides that on application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. This is similar to Article II (3) of the 1958 New York Convention which provides that a court must refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. Then, the meaning of Section 9(4) of the Arbitration Act 1996 should also narrowly be understood having regard to the “pro-enforcement bias to arbitration” of the Convention.<sup>157</sup>

The advantages and disadvantages of courts and arbitration must be balanced. Courts may have the status that comes from being the ultimate dispute resolution system in society, and being in a position to examine carefully whatever issues are brought before them. Therefore, once court proceedings are commenced (particularly before arbitral proceedings are started but also after they are started) courts must fully examine the validity of an arbitration agreement. On the other hand, there is the development of the principle of the separability of an arbitration agreement and *Kompetenz-Kompetenz*, which strongly assume the existence of the valid arbitration agreement for reasons of expediency.

The solution is to seek a compromise. In a sense, courts presume non-existence of an arbitration agreement from the beginning, while arbitrations assume existence from the beginning. As a compromise plan, courts should only check whether or not there is evidence of an agreement on arbitration. The term “arbitration” or its equivalent in a written form may be sufficient. The crucial factors may be written form and the capacity of the parties. Courts should look for *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* competent parties.

On the basis of this rule, courts should carefully examine the validity of an arbitration agreement when there is no such evidence. However, they should refer disputes to arbitration without careful examination of the validity of an arbitration agreement when there is such evidence. This rule can, to some extent, avoid cases where disputes are referred to arbitration with a vaguely worded arbitration clause.

There are, however, many other cases where an arbitration agreement will be regarded as null and void, inoperative or incapable of being performed, even if there

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<sup>157</sup> Id., at 155.

is such written evidence. There are cases where an arbitration agreement has been declared null and void in view of the lack of consent of the parties and lack of capacity of a party to enter into an arbitration agreement. An arbitration agreement has been declared inoperative where there has been a settlement between the parties before the arbitration<sup>158</sup>. These cases can be heard in courts when a party objects to the jurisdiction of the arbitral tribunal. It is the courts that ultimately decide whether or not the arbitral tribunal has jurisdiction. Courts should fully examine the validity of the arbitration agreement at this stage. The above criteria also have significant meaning in terms of competition with respect to jurisdiction, a matter discussed in the previous Chapter.

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<sup>158</sup> Id., at 156-158.

## Chapter 5. Japan

# I. Classification of an Arbitration Agreement

## I-A. Classification under Domestic Law on Arbitration

As mentioned in the previous chapter, classification of an arbitration agreement is significant because it influences a whole range of issues related to arbitration. In Japan there is a dispute as to what kind of agreement an arbitration agreement is. This dispute seems to arise from the system of the juristic act, which makes it necessary to classify contracts. In Japanese civil law, there are two kinds of acts which bring about legal effect: the juristic act and the procedural act<sup>1</sup>. The juristic act is an act of declaration of intention for there to be legal effect under the Civil Code (CC).<sup>2</sup> The procedural act is an act of declaration of intention for there to be legal effect under the Civil Procedure Code (CPC). There are certain agreements, such as mediation or conciliation agreements, which are classified as procedural acts and as contracts.

Thus, in Japan there are contracts which can be classified under both substantive and procedural law. Consequently, it is possible to classify an arbitration agreement as one of the following:

1. contract under substantive law;
2. contract under procedural law;
3. contract of a mixed type involving substantive law and procedural law;
4. original or *sui generis* contract.

The first classification can be explained by "contractual theory" which emphasises the characteristics of a private agreement between the parties, and suggests that arbitration is not a judicial process. Therefore, an arbitration agreement is classified as a contract under substantive law. It abandons protections under the

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<sup>1</sup> The juristic act is regulated by law of real right which a person enjoys in respect of a particular thing and can assert against all the world. The juristic act is also regulated by law of obligation which gives one person a claim against another particular person on the basis of contract, unjustified enrichment, or tort. Under the law of obligation, rules of contracts are defined. (Zweigert, Konrad and Kötz, Hein. Introduction to Comparative Law, 3rd ed. Oxford: Clarendon Press, 1998: p. 145).

<sup>2</sup> Translation of Civil Code, Commercial Code and Law on the Application of Laws in Japan is basically taken from *Basic Japanese Laws* (Oda, Hiroshi ed. Oxford: Clarendon Press, 1997), and their general understanding is based on *Japanese law* (Oda, Hiroshi. London: Butterworths, 1992).

CPC, and leaves dispute settlement in the hands of arbitrators. Although arbitral awards can be enforced by the judicial authority, the obligations of arbitrators are not based on national judicial authority, but on an agreement between the parties.<sup>3</sup> Thus, an arbitration agreement is concluded beyond litigation and should be regarded as an ordinary contract under substantive law.

The second classification can be explained by "procedural theory," which focuses on the direct effects of the decision-making process involved in arbitration. An arbitration agreement makes the parties waive the right to litigation, gives a third party the power to decide the case and makes the decision of a third party equivalent to that of a final judicial judgement.<sup>4</sup> Since all these effects are connected with litigation, an arbitration agreement is regarded as a contract under procedural law. Japanese precedents used to follow the procedural theory.

In *Dai-han* T7.4.15., the Daishin-in (The Great Court of Judicature) decided that: "An arbitration agreement is an agreement to make arbitrators decide civil disputes. As a result, the parties have the right to request a stay of judicial proceedings and the decision of the arbitrators can be regarded as having the same validity as a final judicial judgement. Therefore, the arbitration agreement is a contract not under substantive law but under the Civil Procedure Code."<sup>5</sup>

The third category points to the characteristics of a contract under substantive law at the moment of the conclusion of the agreement, and then focuses on the characteristics of a contract in terms of procedural law for the duration of the arbitral proceedings. Therefore, an arbitration agreement is regarded as having the characteristics of both contracts under substantive law and procedural law. This is called "the mixed theory."

The fourth original or *sui generis* theory underscores the peculiarity of the characteristics of an arbitration agreement and regards it as its own type of contract different from contracts under substantive law, procedural law or a mixture of both. German precedents are based on this fourth view. They regard an arbitration agreement as a contract under the substantive law on regulations under civil procedure, and try to apply substantive law as much as possible.<sup>6</sup> In Japan, academics are still divided on the question of how arbitration agreements should be classified.

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<sup>3</sup> Takagi, Toyozô. "Chûsai-keiyaku no Seishitsu ni kansuru Sanshō-gakusetsu-hanrei." *Hyōron*. Vol. 7: Minso p. 395.

<sup>4</sup> Koyama, Noboru. *Chûsai-hō*, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: p. 34.

<sup>5</sup> *Dai-han* T7.4.15. (*Min-roku*. Vol. 24, 1918: p.865) (Great Court of Judicature's Judgement on 15th April 1918).

<sup>6</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai chûsai-hō*. Tokyo: Seirin-shoin, 1988: p. 35.

## I-B. Classification under International Private Law

The above classification becomes problematic when an arbitration agreement is classified for the purpose of applying conflict of laws rules. In Japan, classification for the purpose of application of domestic laws on arbitration was once used in order to classify for the application of conflict of laws rules. The above-mentioned *Dai-han* T7.4.15. followed this approach.<sup>7</sup>

This approach was changed because of the development of international commercial arbitration. In recent years, classification of an arbitration agreement for the application of conflict of laws rules and for application of domestic law have not necessarily been guided by the same classification theory.<sup>8</sup>

As regards classification of an arbitration agreement for the application of conflict of laws rules, the contractual theory is followed. In *Tokyo-chi-han* H5.3.25.,<sup>9</sup> the Tokyo District Court stated that an arbitration agreement was an agreement to bring about an effect under procedural law, but that, considering that it was an agreement to choose a voluntary way of settling disputes between the parties themselves, it was similar to a contract under substantive law. Therefore, in determining the law applicable to an arbitration agreement, the agreement should be treated in the same way as an ordinary contract under substantive law.

In the appeal case, *Tokyo-kô-han* H6.5.30.,<sup>10</sup> the Tokyo High Court supported the above decision. It also stated that a stay of proceedings on the basis of an arbitration agreement is brought about because the court recognises that it has conceded some power to the arbitral tribunal. In contrast with the procedural characteristics of the court, the arbitration agreement was classified as a contract under the substantive law.

Thus, an arbitration agreement basically has effects under procedural law but is treated as a contract under substantive law. An arbitration agreement is legally classified for the purpose of the application of conflict of laws rules as a contract under substantive law.<sup>11</sup>

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<sup>7</sup> Sawaki, Takao. "Chûsai-keiyaku oyobi Chûsai-kanôsei no Junkyo-hô." Gendai-chûsai-hô no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yûhikaku, 1998: p. 371 at 373.

<sup>8</sup> This is based on advice from Professor Kazuo Iwasaki in the Nagoya Keizai University in Japan.

<sup>9</sup> *Tokyo-chi-han* H5.3.25. (Han-ta. Vol. 816: p. 233) (Tokyo District Court's Judgement on 25th March 1993).

<sup>10</sup> *Tokyo-kô-han* H6.5.30. (Han-ji. Vol. 1499: p. 68) (Tokyo High Court's Judgement on 30th May 1994). This information was obtained by courtesy of Professor Kazuo Iwasaki in the Nagoya Keizai University in Japan.

<sup>11</sup> Iwasaki, Kazuo. "119 Chûsai no Junkyo-hô." Bessatsu Jurisuto No. 133 Shôgai-hanrei-hyaku-sen.

However, an arbitration agreement has characteristics of contracts under both substantive and procedural law. In *Tokyo-chi-han* H5.3.25.,<sup>12</sup> the Tokyo District Court recognised that an arbitration agreement had mixed characteristics. It stated that an arbitration agreement was an agreement to bring about effects under procedural law, but also has characteristics similar to a contract under substantive law.

There was a precedent which clearly distinguished classification for the application of conflict of laws rules from that for domestic law on arbitration, according to the effects of an arbitration agreement. In *Tokyo-chi-han* S28.4.10.,<sup>13</sup> the Tokyo District Court stated that from the party's side, the right to claim a stay of court proceedings was guaranteed by the law applicable to the arbitration agreement. On the other hand, the decision to stay court proceedings is determined by the law of the country where the claim was brought on the basis of the procedural issue. The Court added that there is no reason to deny a valid claim of stay under foreign law.<sup>14</sup> The issue of the commencement of litigation irrespective of the existence of an arbitration agreement should be examined as an issue of tort by the law of the country where the litigation was started.<sup>15</sup>

Thus, the party's right of a claim to stay court proceedings is subject to the validity of an arbitration agreement. Consequently, it is governed by the law applicable to an arbitration agreement, on the basis of the classification for conflict of laws. On the other hand, the issue of staying court proceedings is determined by *lex fori*, on the basis of classification under the domestic law on arbitration. There is a clear distinction between classification under the domestic law on arbitration and classification under international private law in Japan.

## I-C. Sui Generis Contract

As mentioned above, the issue of classification of an arbitration agreement is still controversial under the law on arbitration. Under international private law it is classified as an ordinary contract.

Whether the agreement is classified under the law on arbitration or international private law, strictly speaking it is difficult to regard an arbitration

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3rd ed. Tokyo: Yūhikaku, 1995: p. 240.

<sup>12</sup> *Tokyo-chi-han* H5.3.25. (*Han-ta*. Vol. 816: p. 233) (Tokyo District Court's Judgement on 25th March 1993).

<sup>13</sup> *Tokyo-chi-han* S28.4.10. (*Ka-min-shū*. Vol. 4, No. 4: p. 503) (Tokyo District Court's Judgement on 10th April 1953).

<sup>14</sup> *Id.* at 507.

<sup>15</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai Chūsai-hō*. Tokyo: Seirin-shoin, 1988: p. 223.



agreement as a contract under substantive law because, according to the Japanese Civil Code, a contract must bring about a personal obligation on the basis of corresponding claims. In an arbitration agreement, both parties have two intentions: to promote arbitral proceedings and to realise arbitral awards, as the Table C5-1 shows. Obligations described in arbitral awards can bring about corresponding claims. However, the promotion of arbitral proceedings is based not on corresponding claims against one another, but on a joint action with a shared purpose, which also brings about a legal effect. To secure arbitration, one party can ask the court to stay proceedings if another party brings an action to the court. However, this remedy does not accept the corresponding claims, it merely expects another party to participate in the arbitration.

The promotion of arbitral proceedings can also be based on an individual action, because a party alone can complete the arbitral proceedings without the appearance of another party if due process is satisfied. Logically, it is difficult to regard an arbitration agreement as an ordinary contract under the Civil Code.

Table C5-1 Peculiarity of an Arbitration Agreement

The Moment of Conclusion of Arbitration Agreement			
Intention	Expectation of Legal Effects	To Promote Arbitration	To realise Arbitral Awards
Acts	Conclusion of Arbitration Agreement	Joint or individual Action of Quasi-Trial	Enforcement of the Awards

Since there is no great difference between rules on contracts under the Civil Code and Civil Procedure Code, it does not cause serious problems if an arbitration agreement is classified as an ordinary contract, and consequently the same rules used for an ordinary contract are applied to it. However, in civil law countries, to regard an arbitration agreement as an ordinary contract may cause logical problems, as mentioned above. This difference in classification brings about the problem of, for example, whether or not the term ‘contract’ includes an arbitration agreement under the EEC Convention on the Law Applicable to Contractual Obligations (the 1980

Rome Convention).<sup>16</sup>

Indeed, an arbitration agreement has both contractual and procedural characteristics. If the effect of an arbitration agreement under procedural law is focused on, the arbitration agreement should be regarded as a contract under procedural law, but if the party's autonomy in arbitral proceedings is emphasised, it must be treated as an ordinary contract under substantive law. Under such conditions, only the mixed theory and the *sui generis* theory can fully explain the unique characteristics of an arbitration agreement.

Acceptance of the mixed theory is, however, difficult, because it must also, in theory, create a new act involving a mixture of juristic and procedural acts between the Civil Code and Civil Procedure Code. Although it has not been clearly pointed out, classification of contracts must accompany classification of juristic or procedural acts. The mixed theory may affect the entire judicial system in Japan. Therefore, courts may tend to follow either the contractual or procedural theory, although they recognise both the substantive and procedural characteristics of an arbitration agreement.

Therefore, an arbitration agreement should be understood under the remaining *sui generis* theory, while considering the substantive and procedural characteristics of an arbitration agreement, as suggested in the mixed theory. In this context, formation of an arbitration agreement should be examined by substantive law. Then its effects, including a stay of court proceedings, should be subject to procedural law.

Thus, an arbitration agreement should be classified as a *sui generis* contract, irrespective of the classification under domestic law on arbitration or international private law, in the specific regime of international commercial arbitration. Rules under substantive law and procedural law should be invoked in order to create detailed rules for *sui generis* classification. In this way, harmonisation of classification of an arbitration agreement under the law on arbitration and under international private law can be achieved. This simplification of the rules on arbitration would be especially helpful in assisting foreigners to understand Japanese law on arbitration.

Internationalisation of arbitration is an important issue in Japan. There is no distinction between domestic and international arbitration under the Law on Arbitration. Therefore, arbitration involving foreign parties can be subject to this

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<sup>16</sup> The Convention was finalised at a special meeting of the Council of the European Communities in Rome on 19th June 1980 and was opened for signature. The UK signed it in 1981 and ratified it in January 1991. The Convention came into force in 1st April 1991. In the UK, the Contracts Act 1990 (the 1990 Act) gave effect to the Rome Convention.

law. The *sui generis* classification of an arbitration agreement in an international context under the specific regime of international commercial arbitration seems to be the best way to achieve not only logical co-ordination under law on arbitration but also a simplification of the rules on arbitration in Japan.

## II. Under International Private law

### II-A. Law Applicable to the Capacity of Parties to Enter into an Arbitration Agreement

#### II-A-1. Capacity of a (Natural) Person

##### II-A-1-a. Application of Rules of Conflict of laws on Juristic Acts

As mentioned above, there are four theories on the classification of an arbitration agreement under the Law on Arbitration in Japan. If this classification is directly applied to the classification under conflict of laws, the Japanese court will have accepted the procedural theory. Then, to enter into an arbitration agreement, a person must have the capacity to enter into not juristic acts (*hōritsu-kōi*) but procedural acts (*soshō-kōi*).

There are no provisions regarding conflict of laws relating to the capacity to enter into an arbitration agreement in Japan. However, Article 28 of the 1996 CPC (Article 45 of the 1890 CPC) provides that the rules on the capacity to enter into procedural acts follow that relating to juristic acts except in specific cases. By analogy from this provision, under the procedural theory, rules of conflict of laws on juristic acts can also be applied to the capacity to enter into an arbitration agreement.<sup>17</sup>

Recently, however, classification under the Law on Arbitration and international private law have been separated. As regards classification under international private law, an arbitration agreement is classified as an ordinary contract, and conflict of laws rules on juristic act are applied.

Thus, in respect of both the contractual and procedural theories, rules of conflict of laws regarding entering into juristic acts are applied to examine the capacity of a person to enter into an arbitration agreement in Japan. Article 3(1) of the Law on the AL (Law on the Application of Laws) provides that the capacity of a person to enter into juristic acts is determined by the law of his or her domicile. Therefore, the capacity of a person to enter into procedural acts is also determined by

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<sup>17</sup> Sawaki, Takao. Kokusai-shihō-nyūmon. Tokyo: Kabushiki-gaisha Yūhikaku, 1984: p. 213.

the law of his or her domicile.<sup>18</sup>

Article 28(2) of the Law of the AL provides that where the law of domicile of the party is to govern and the party has no nationality, the law of the party's place of habitual residence shall govern. If the law of habitual residence cannot be determined by the court, there is, in theory, no applicable law. Then, the only possibility may be to apply Japanese law.

## II-A-1-b. Principle of Protection of Juristic Acts Made in Japan

As mentioned above, whether an arbitration agreement is classified as a contract under the Civil Code or Civil Procedure Code, the capacity to enter into an arbitration agreement is determined by the law of the party's domicile. Thus, there is no difference between the contractual theory and procedural theory as regards the capacity of a person to enter into an arbitration agreement.

As regards application of provisions which are designed to allow domestic business conducted in Japan to run more smoothly (*naikoku-torihiki-hogo-shugi*),<sup>19</sup> Article 3(2) of the Law on the AL provides that where an alien carries out a juristic act in Japan, if he or she is a person of full capacity according to Japanese law, even though he or she may not have capacity according to the law of his or her domicile, they are regarded as a person of full capacity.

Similarly, Article 33 of the 1996 CPC (Article 51 of the 1890 CPC) provides that an alien, who is incapable of participating in procedural acts in Japan according to the law of his or her domicile, but is capable according to Japanese law, can be regarded as having capacity in Japan.

Thus, under both the contractual and procedural theory, if an arbitration agreement is concluded in Japan, the party is regarded as capable of entering into the arbitration agreement even if they are incapable according to the law of their own domicile.

The above rules are not applied in the case of a contract made at a distance, because, according to the Law on the AL, the place from which notice of the offer is dispatched is regarded as the place of the act (Article 9 of the Law of the AL). This rule does not apply to cases under Article 33 of the 1996 CPC. Therefore, in a case

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<sup>18</sup> *Sai-han* S34.12.22. (*Han-ji*, No. 211: p. 13) (Supreme Court Judgement's on 22nd December 1959).

<sup>19</sup> This principle was first recognised in the *Lizardi* case (*l'affaire Lizardi*) in France. In terms of the principle of the general territorial jurisdiction, Japanese law adopts this principle in the case of exchange of bills and cheques in accordance with the Geneva Conventions for the Unification of Law on Bills of Exchange, Promissory Notes and Cheques (1930-31). The UK became a party of only one Convention on Stamp Laws in connection with Bills of Exchange and Promissory Notes, because the Conventions had strong civil law characteristics such as distinction of commercial acts from ordinary juristic acts.

where a Japanese party sends an offer of an arbitration agreement from Japan to a foreign party, although the place of the act is in Japan according to Japanese law, the law of the foreign party's domicile is applied to determine the capacity to enter into the arbitration agreement.

### II-A-1-c. Capacity to Make Pleadings

Strictly speaking, the capacity of a party to make pleadings in arbitral proceedings is independent from the capacity of a person to enter into an arbitration agreement. In Japan, the law applicable to the capacity to make pleadings is, based on the principle of law of the forum, the law of the country where the proceedings take place.<sup>20</sup>

As a result, the law governing the capacity of a person to enter into an arbitration agreement is the law of his or her domicile, and the law applicable to the capacity of a person to plead is the law of the country where the arbitration takes place.

It may happen that a person who has capacity to enter into an arbitration agreement based on the law of his or her domicile does not have the capacity to plead the case according to the law of the country where the arbitration takes place. Obviously, the latter has characteristics that are more procedural in nature. The procedural classification of an arbitration agreement affects rules on arbitration. A case involving a minor in England would illustrate the above example, although it is rare indeed that a minor is involved in international commercial arbitration.

In England, a minor is not bound by an agreement to refer a dispute to arbitration, unless they ratify it after attaining majority.<sup>21</sup> There are several exceptions. For example, an arbitration agreement relating to the supply of necessities or services is binding upon a minor.<sup>22</sup> A contract clearly for a minor's benefit is also binding upon him or her.

In *Slade v. Metrodent Ltd.*,<sup>23</sup> an arbitration agreement between Slade, who was a minor at that time, and Metrodent, the dental company, to refer disputes to the National Joint Council for the Craft of Dental Technicians was regarded as binding upon the minor. In that case, the arbitration clause in the deed of apprenticeship was considered not to be independent from the deed. Since the deed itself was beneficial

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<sup>20</sup> Sawaki, Takao. *Kokusai-shihô-nyûmon*. Tokyo: Kabushiki-gaisha Yûhikaku, 1984: p. 213.

<sup>21</sup> Guest, A. G. general ed. *Chitty in Contracts Vol. 1: General Principles*, 27th ed. London: Sweet & Maxwell, 1994: p. 452.

<sup>22</sup> Sutton, David St. John, Kendall, John and Gill, Judith. *Russell on Arbitration*, 21st ed. London: Sweet & Maxwell, 1997: p. 96.

<sup>23</sup> *Slade v. Metrodent Ltd.* [1953] 2 LR 112.

to the minor, the arbitration agreement was regarded as binding upon the minor. Furthermore, Slade, through his father, had sued the defendant citing the deed. It was, therefore, difficult for Slade to reject only the validity of the arbitration clause in the deed which otherwise he recognised as binding upon himself. McNair J. stated that it was a well-established principle that an infant, even during infancy, was bound by any contract which the court considered to be of benefit to the infant.<sup>24</sup>

If an arbitration agreement is binding upon a minor, a logical problem may arise. A minor, who has succeeded in validly concluding an arbitration agreement by themselves, cannot commence arbitration or litigation relating to arbitration on their own. The minor needs a guardian. In this sense, as *Dicey and Morris on the Conflict of Laws* stated, an agreement to submit to arbitration is by its nature procedural.<sup>25</sup> Arbitral proceedings require not merely the simple capacity to enter into an ordinary contract but a more specific capacity to enter into procedural acts.

To avoid confusion over the law applicable to capacity, it would be desirable to harmonise the law applicable to the capacity of a party to enter into an arbitration agreement and to make pleadings in arbitration. If one party can enter into an arbitration agreement according to the law of his or her domicile, they should be regarded as capable to plead in arbitration. This must make arbitration run more smoothly in practice.

## II-A-2. Capacity of a Juridical Person

### II-A-2-a. General Legal Capacity

Whether an arbitration agreement is classified as a juristic or procedural act, a juridical person is required to have the general legal capacity to perform any legal acts including the conclusion of an arbitration agreement. In terms of the general legal capacity of juridical persons, the law of the country where the juridical person was created is applied (*setsuritsu-junkyo-hô-shugi*) in Japan. In most civil law countries, the law of the country where central management and control of a juridical person is exercised is applied (*honkyo-chi* or *jûsho-chi-hô-shugi*).

In Japan, the *ultra vires* doctrine must be applied. To protect the other party who believed that the juridical person had capacity, some scholars insist that it is not the law applicable to general legal capacity, but the law applicable to legal acts, which should be used in order to determine the capacity of the juridical person.<sup>26</sup>

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<sup>24</sup> Id., at 115.

<sup>25</sup> Morris, J. H. C. ed. *Dicey and Morris on the Conflict of Laws* Vol. 2. London: Stevens & Sons Ltd., 1980: p.1126.

<sup>26</sup> Tameike, Yoshio. *Kokusai-shihô-kôgi*. Tokyo: Kabushiki-gaisha Yûhikaku, 1993: pp. 286-287; Sawaki, Takao. *Kokusai-shihô-nyûmon*. Tokyo: Kabushiki-gaisha Yûhikaku, 1984: pp. 157-158.

Accordingly, since an arbitration agreement has recently been regarded as an ordinary contract in terms of its classification under international private law, the law applicable to the capacity of the juridical person to enter into it is the law applicable to the arbitration agreement.

## II-A-2-b. Principle of Protection of Juristic Acts Made in Japan by a Foreign Juridical Person

There are some precedents which tried to make domestic business conducted by a foreign juridical person in Japan run more smoothly, irrespective of the law applicable. In *Kôbe-chi-han*, S34.9.2.,<sup>27</sup> a Korean company lodged an objection against the seizing of a ship in Japan, based on a credit contract between a Japanese company and an agent of the Korean company. This case involved the apparent authority of an agent. The Korean company insisted that the so-called agent did not have the capacity to conclude the credit contract. The Kôbe District Court decided, in that case, that the *lex loci contractus* should be applied in spite of the principle of applying the domestic law of the country where the juridical person was formed.

By analogy with this case, if an arbitration agreement is concluded by an agent of a foreign company in Japan, the law applicable to the capacity of the juridical person to enter into the arbitration agreement is Japanese law as long as the other party did not know of the incapacity of the foreign party.

A company which establishes its principal office in Japan, or whose main work involves business in Japan, must comply with the same provisions as a company established in Japan, even though the company was established in a foreign country (Article 482 of the Commercial Code). In those cases, Japanese law is applied to examine the capacity of the parties to enter into the contract in the context of the principle of protection of juristic acts made within the territory (*naikoku-torihiki-hogo-shugi*).

Thus, as regards the capacity of a juridical person to enter into an arbitration agreement, first, the general capacity is determined by the law of the country where the juridical person was established. However, if an arbitration agreement was concluded by a foreign juridical persons in Japan, there is a possibility that the Japanese law on the capacity of the party to enter into juristic acts will be applied, provided that an arbitration agreement is regarded as an ordinary contract.

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<sup>27</sup> *Kôbe-chi-han* S34.9.2. (*Ka-min-shû*, Vol. 10, No. 9: p. 1849) (Kôbe District Court's Judgement on 2nd September 1959).

## II-B. Law Applicable to an Arbitration Agreement

### II-B-1. Transition of Theories

#### II-B-1-a. Procedural Theory under the Law on Arbitration

As mentioned in the previous section, there have been four theories put forward to explain the characteristics of an arbitration agreement in Japan. Under the law on arbitration, an arbitration agreement is classified as a contract under the Civil Procedural Code. That is, an arbitration agreement is regarded as a legal act under procedural law. Then, the law applicable to the arbitration agreement must be exclusively Japanese law on the basis of the principle of territorial jurisdiction as to procedural acts. In *Dai-han* T7.4.25. (1918),<sup>28</sup> the Old Supreme Court followed the procedural theory and stated that an arbitration agreement must be examined by the Japanese CPC. In so far as procedural classification under the law on arbitration is directly applied to classification under international private law, an arbitration agreement is understood in the context of a procedural act, and consequently there is no possibility of a conflict of laws.

#### II-B-1-b. Contractual Theory under International Private Law

The above classic view has been dismissed. Recently, an arbitration agreement has been classified as an ordinary contract under substantive law. Consequently, conflict of laws rules are applied to determine the law applicable to an arbitration agreement. Although it has not been clearly pointed out, the classic view has logically been changed step by step.

First, the procedural classification under the law on arbitration was retained, but courts looked for a way to apply conflict of laws rules. In 1935, in *Tokyo-kô-han* S10.8.5,<sup>29</sup> the Tokyo High Court stated:

“The aim of the arbitration agreement is not to establish legal effect under substantive law. Consequently substantive law should not be applied for the purpose of determining the legal effects of the arbitration agreement. However, if the spirit of the establishment of the Japanese Civil Procedure Code is sought, taking into

<sup>28</sup> *Dai-han* T7.4.15. (*Min-roku*, Vol. 24: p. 865) (Great Court of Judicature's Judgement on 15th April 1918).

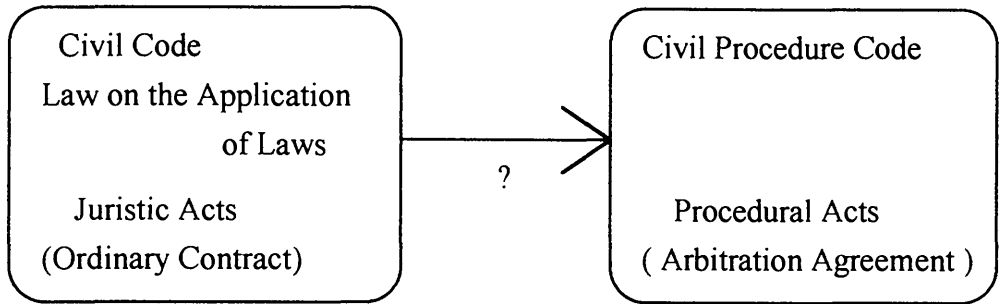
<sup>29</sup> *Tokyo-kô-han* S10.8.5. (*Shinbun*, No. 3904, 1935: p.6.) (Tokyo High Court Judgement's on 10th August 1935).



consideration the German Civil Procedure Code, the provisions of the Civil Code should be applied in so far as there are no corresponding provisions in the Civil Procedure Code.”<sup>30</sup>

Thus, the crucial issue was to find a logical connection between the application of provisions under the Civil Code and the procedural act of an arbitration agreement under the Civil Procedure Code, as Table C5-2 shows. The court in *Tokyo-kô-han* S10.8.5. considered the connection between the Civil Code and the Civil Procedure Code as regards the background to their establishment, and made it possible to apply the provisions of juristic acts to cases of procedural acts, that is, to arbitration agreements.

Table C5-2 Application of Rules on Juristic Acts



Then, so long as this precedent is followed, classification under the law on arbitration and under international private law must be separate. In 1953, this idea was clearly accepted in *Tokyo-chi-han* S28.4.10.<sup>31</sup> The main issue was the principle of staying court proceedings where there was an arbitration agreement. The Tokyo District Court stated that the right of a claim to stay court proceedings is guaranteed by the law applicable to the arbitration agreement. On the other hand, the decision to stay court proceedings is made under the law of the country where the claim was brought on the basis of the procedural issue. The Court added that there is no reason to deny a valid claim of stay under foreign law.<sup>32</sup> The issue of commencement of litigation irrespective of the existence of an arbitration agreement should be examined as an issue of tort according to the law of the country where the litigation was commenced.<sup>33</sup>

In this case, an arbitration agreement was classified as a procedural contract

<sup>30</sup> Id.  
<sup>31</sup> *Tokyo-chi-han* S28.4.10. (Ka-min-shû Vol. 4, No. 1-6, 1953: p. 502) (Tokyo District Court’s Judgement on 10th April 1953).  
<sup>32</sup> Id., at 507.  
<sup>33</sup> Kojima, Takeshi and Takakuwa, Akira ed. Chûkai Chûsai-hô. Tokyo: Seirin-shoin, 1988: p. 223.

under the Japanese CPC as regards the issue of a stay of court proceedings. On the other hand, under international private law it was classified as an ordinary contract. Its validity was examined according to the American inter-state law.

Recently, the procedural classification under the law on arbitration has appeared to lose any influence over classification under international private law. In so far as international private law is concerned, an arbitration agreement is classified as an ordinary contract in the context of a juristic act, and its conflict of laws rules are applied to determine the law applicable to the arbitration agreement.

In *Tokyo-chi-han* H5.3.25.,<sup>34</sup> the Tokyo District Court stated that an arbitration agreement was an agreement to bring about an effect under procedural law, but, in determining the law applicable to an arbitration agreement, it should be treated in the same way as an ordinary contract under substantive law. The Tokyo High Court supported this decision and stated that a stay of court proceedings should be recognised as reflecting the effects of arbitration, that is, alternative dispute resolution, and therefore the sphere in which the parties could claim a stay on the basis of the arbitration agreement should be examined according to the law applicable to it.<sup>35</sup>

## II-B-2. Conflict of Laws Rules on Juristic Acts

### II-B-2-a. Law Designated by the Intention of the Parties

On the basis of the classification of an arbitration agreement as an ordinary contract under the CC, it becomes possible to apply conflict of laws rules on juristic acts under the Law on the Application of Laws (AL) (*Hôrei*). This Law on the AL basically stipulates conflict of laws rules for juristic acts.

Article 7 provides that as regards the formation and effect of a juristic act, the question as to what is the governing law is determined by the intention of the parties. Thus, the law applicable to an arbitration agreement is, first of all, determined by the intention of the parties. The law governing an arbitration agreement covers its validity, effect, and interpretation.<sup>36</sup>

There is no provision which obliges a court to ascertain the intention of the parties regarding the law applicable to juristic acts. Generally speaking, Japanese courts are not eager to ascertain the chosen law by implication.<sup>37</sup> In *Tokyo-chi-han*

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<sup>34</sup> *To-chi-han* H5.3.25. (*Han-ta*, Vol. 816: p. 233) (Tokyo District Court's Judgement on 25th March 1993).

<sup>35</sup> *To-kô-han* H6.5.30. (*Han-ji*, Vol. 1499: p. 68) (Tokyo High Court's Judgement on 30th June 1994).

<sup>36</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chûkai Chûsai-hô*. Tokyo: Seirin-shoin, 1988: p. 219.

<sup>37</sup> Yamada, Ryôichi and Hayata, Yoshirô ed. *Enshû Kokusai-shihô*. Tokyo: Yûhikaku, 1993: p.115.

S52.4.22.,<sup>38</sup> the Tokyo District Court sought to determine the law implied by the parties, and regarded Japanese law as the law applicable to the contract, based on the fact that the president of an American company came to Japan and made a contract with a Japanese company regarding the supply of TV cabinets which would be made in Japan. Neither party disputed the law applicable to the contract during the court proceedings. The court ascertained the chosen law by implication when such conditions were present.

In relation to the determination of the law applicable to an arbitration agreement, there are several cases where the court recognised that the law could be implied by the actions of the parties. The law governing the main contract and the law of the country where the arbitration was or is to be conducted appear to be the important factors used to determine the law applicable to an arbitration agreement in Japan. In *To-chi-han* S34.8.20.,<sup>39</sup> the law governing the main contract was applied to interpret the arbitration agreement.<sup>40</sup>

In *Tokyo-kô-han* H6.5.30.,<sup>41</sup> the Tokyo High Court decided that in the absence of an agreement on the law applicable to an arbitration agreement, the law of the country indicated as the seat of arbitration could be regarded as the implied law applicable to an arbitration agreement.

In the case of *Yokohama-chi-han* S50 (wa) No. 1552,<sup>42</sup> there was no indication as to the law governing the arbitration agreement. The Yokohama District Court decided that the law applicable to the arbitration agreement should be the law of New York State, taking into account both the law governing the main contract and the law of the country where arbitration was to be conducted.

## II-B-2-b. The Law of the Country where the Arbitration Agreement was Concluded

In cases where both the law chosen and implied by the parties is not clear, the law of the country where the arbitration agreement was concluded should be applied. Article 7 (2) of the Law on the AL provides that if the intention of the parties is

<sup>38</sup> *Tokyo-chi-han* S52.4.22. (*Han-ji*, No. 863: p. 100) (Tokyo District Court's Judgement on 22nd April 1977).

<sup>39</sup> *To-chi-han* S34.8.20. (*Ka-min-shû*, Vol. 10, No. 8: p. 1711) (Tokyo District Court's Judgement on 20th August 1959).

<sup>40</sup> Details on the law applicable to an arbitration agreement, see, Iwasaki, Kazuo. "119 Chûsai no junkyo-hô." *Bessatsu Jurisuto* No. 133 *Shôgai hanrei hyaku-sen*, 3rd ed. Tokyo: Yûhikaku, 1995: p. 240 at 241.

<sup>41</sup> *Tokyo-kô-han* H6.5.30. (*Han-ji*, Vol. 1499: p. 68) (Tokyo High Court Judgement's on 30th May 1994).

<sup>42</sup> Pryles, Michael and Iwasaki, Kazuo. *Dispute Resolution in Australia-Japan Transactions*. London: Lanbook Company Ltd., 1983: p. 121.

uncertain, the law of the place where the act is done shall govern.

In the case of a contract made at a distance, Article 9 of the Law of the AL provides that the place from which notice of the offer is dispatched is regarded as the place of the act. If the recipient of the offer is ignorant, at the time of his or her acceptance, of the place from which the offer was dispatched, the place of the offeror's domicile is regarded as the place of the act. Thus, if a party sends an offer of an arbitration agreement in the form of a fax from Tokyo to London, and the other party returns an acceptance, the place where the arbitration agreement is concluded would be regarded as Tokyo. A contract *inter absentes* (made at a distance) comes into existence at the time when notice of acceptance is dispatched. (Article 526(1) of the CC).

## II-B-3. Application of Foreign Law

Generally speaking, the common law regards foreign law as fact, and the civil law considers it as law. Japanese law belongs to the civil law family, and applies foreign law not according to a Japanese interpretation of the relevant issue, but according to the foreign legal system. The foreign law is, however, not incorporated into the Japanese legal system, and consequently it is not regulated by relevant Japanese law. Foreign law applied in the Japanese court is invalid only when it is contrary to Japanese public policy.<sup>43</sup>

As mentioned above, an arbitration agreement is classified as a procedural contract under the law on arbitration, but as an ordinary contract under international private law in Japan. In other countries, it may be regarded as a contract under the civil code without separation of classifications under the law on arbitration and international private law. Furthermore, recently many countries have adopted specific rules on arbitration. Therefore, it is suggested that such specific laws should be studied and applied in Japanese courts.<sup>44</sup>

It is the judge who must examine and apply the foreign law in Japan. The Supreme Court has allowed an appeal on the grounds of a mistake in interpretation of foreign law.<sup>45</sup> Some scholars have suggested that there are limitations to a judge's ability to study and understand foreign laws.<sup>46</sup> This is a serious problem when the

<sup>43</sup> Tameike, Yoshio. Kokusai-shihô-kôgi. Tokyo: Kabushiki-gaisha Yûhikaku, 1993: p. 236.

<sup>44</sup> Kidana, Shôichi, Matsuoka, Hiroshi and Watanabe, Satoshi. Kokusai-shihô-gairon. Tokyo: Kabushiki-gaisha Yûhikaku, 1994: p. 70.

<sup>45</sup> *Sai-han (Dai-san-shô-hôtei)* S56.7.2. (Min-shû. Vol. 35, No. 5: p. 881) (Supreme Court' Judgement on 2nd July 1981).

<sup>46</sup> Ishiguro, Kazunori. Kokusai-minji-funsô-shori no shinsô. Tokyo: Kabushiki-gaisha Nihon-hyôron-sha, 1992: pp. 217-250.

separability of an arbitration agreement is examined to grant a stay of court proceedings in Japan.

As mentioned above, in the case of a stay of court proceedings on the basis of an arbitration agreement governed by a foreign law in Japanese courts, the validity of the arbitration agreement is examined according to the foreign law, but the issue of a stay is examined as a procedural matter according to the Japanese law on Arbitration.

Thus, examination of the validity of the contract and the arbitration agreement under foreign law in terms of the separability of an arbitration agreement is the pre-condition for a stay of court proceedings. As already stated, a mistake in the interpretation of a foreign law can be a reason for an appeal. In theory, the Japanese court must fully study repudiation, rectification and initial invalidity of the contract and the validity of the arbitration agreement in each case. Interpretation must be different in each country. It is considerably difficult and time-consuming for the court.

As suggested in previous chapters, it is desirable that courts should refer cases to arbitration on the basis of *prima facie* written evidence of an arbitration agreement which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* competent parties. The principle of the separability of an arbitration agreement and Kompetenz-Kompetenz all function to guarantee the temporary existence of a valid arbitration agreement. Courts should refer cases to arbitration if the existence of an arbitration agreement can be *prima facie* presumed, and consequently judges need not fully study relationships between the invalidity of the main contract and the validity of the arbitration agreement.

## III. Under the Law on Arbitration

### III-A. Principle of Separability

#### III-A-1. Precedents

Recently, the principle of the separability of an arbitration agreement has been widely recognised in the world. That is, to settle the dispute arising from the invalidity of the main contract by arbitration, the arbitration agreement must be valid, separate from the main contract. However, this is not provided for in the Law on Arbitration in Japan. Although there are a few cases which have suggested the separability of an arbitration agreement, it is unclear whether the law applicable to the main contract and the arbitration agreement was foreign law or Japanese law.

In the case of *Tokyo-chi-han* S28.4.10<sup>47</sup>, the main issue was the principle of staying court proceedings where there was an arbitration agreement. The defendant stated, as one of the reasons why the court should not stay the proceedings, that the arbitration agreement lost its validity when the main contract was nullified. The court stated that the arbitration agreement was concluded in order to resolve disputes relating to the main contract, and therefore it did not lose its validity with the annulment of the main contract. Rather, the reason for its existence was to resolve the disputes caused by the nullification of the main contract.<sup>48</sup>

Strictly speaking, the principle of separability was recognised under the American inter-state law in this case. Then, the existence of the valid arbitration agreement was regarded as the basis for a stay of court proceedings under the Japanese Civil Procedure Code.

Similarly, in 1975, in *Sai-han (Dai-san-shô-hôtei)* S50.7.15.,<sup>49</sup> the Supreme Court decided that the voiding of the main contract by reason of a mistake did not effect the validity of the arbitration agreement. In that case, a Japanese metal company, Kokusan-kinzoku-kôgyô-kabushiki-gaisha, made a contract in Tokyo giving exclusive rights to sell its keys in the USA and Canada to an American company not yet formed by its promoter, Mr. Wofner, Vice-President of U.S. Ltd. He was responsible for registering the new company and for concluding the contract under the name of the new company which had not been fully incorporated.

In this case, the Japanese company appointed an arbitrator before arguing that it had entered into the contract by mistake. As a result, the Supreme Court decided that the contract was validly concluded because the Japanese company had been aware of the situation regarding the process of incorporating the new company. The Supreme Court did not make clear what was the law applicable to the contract and the arbitration agreement. However, as regards repudiation of the contract, the Supreme Court stated:

“The Japanese company insisted that even if the contract was valid, it was made in error with the unincorporated company, and was later repudiated. However, there is an arbitration agreement which states that all disputes arising out of this contract should be referred to arbitration. This is

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<sup>47</sup> *Tokyo-chi-han* S28.4.10. (*Ka-min-shû* Vol. 4, No. 1-6, 1953: p. 502) (Tokyo District Court's Judgement on 10th April 1953).

<sup>48</sup> *Id.*, at 508.

<sup>49</sup> *Sai-han (Dai-san-shô-hôtei)* S50.7.15. (*Min-shû* Vol. 29, No. 5-8, 1975: p. 1061) (Supreme Court's Judgement on 15th July 1975).

a reason to stay court proceedings.”<sup>50</sup>

In other words, repudiation of the contract causes the dispute arising out of the contract, and does not effect the validity of an arbitration agreement. Although the law applicable to the arbitration agreement was not discussed in this case, it seems that the above statement concerns a general principle under Japanese law. The reasoning of the Japanese court as regards the separability of an arbitration agreement seems to follow the explanation based on logical consequence. That is, termination of the main contract does not mean the end of any relationship between the parties. There may be problems of compensation, unlawful enrichment, etc. It is reasonable, therefore, to rule an arbitration agreement valid in order to deal with such problems.<sup>51</sup>

### III-A-2. Relationship with Classification of an Arbitration Agreement

The position in cases as regards the principle of the separability of an arbitration agreement is still not clear in Japan. It is agreed by academics that if the main contract is repudiated by an agreement, the arbitration agreement should also be invalid.<sup>52</sup> However, opinions are divided on the validity of an arbitration agreement as regards initial invalidity of the main contract.

If the main contract was initially invalid or was initially repudiated, the arbitration agreement should also be invalid initially unless the arbitration clause clearly provides that such disputes can also be referred to arbitration.<sup>53</sup> On the other hand, there is an understanding that the arbitration agreement does not lose its validity automatically when the main contract is repudiated.<sup>54</sup>

The Japanese court seems to accept the explanation based on logical consequence. That is, termination of the main contract does not mean the end of any relationship between the parties. However, if Japanese law is strictly applied, this explanation may not be satisfactory. As mentioned above, an arbitration agreement is classified as a contract under the CPC in Japan. However, similar rules on juristic

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<sup>50</sup> Id., at 1078.

<sup>51</sup> Lebedev, Sergei N. Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storov. Moscow: Torgovo-promyshlennaya Palata SSSR, 1988: pp. 80-81.

<sup>52</sup> Koyama, Noboru. Chūsai-hō, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: p 100; Matsuura, Kaoru. “Chūsai-keiyaku no Shikkō.” Gendai Chūsai-hō no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1998: p. 181.

<sup>53</sup> Koyama, Noboru. Chūsai-hō, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: p 100.

<sup>54</sup> Matsuura, Kaoru. “Chūsai-keiyaku no Shikkō.” Gendai Chūsai-hō no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1998: p. 181.

acts on repudiation under the CC can be invoked.<sup>55</sup> In so far as these rules are strictly applied, if the main contract is repudiated on the basis of mistakes, the arbitration agreement must logically also be repudiated on the basis of the same reason.

It is difficult to explain the principle of the separability of an arbitration agreement under the Japanese law. One possible explanation may be that an arbitration agreement is classified as a contract under the CPC, different from the main contract under the CC. Consequently, repudiation of the main contract does not influence the arbitration agreement. Russia follows this approach and a further explanation is provided in the following chapter. However, this logic cannot be applied to international cases in Japan. Under international private law, an arbitration agreement is classified as an ordinary contract, which is the same as the main contract.

After all, as mentioned above, an arbitration agreement should be understood in the context of the *sui generis* contract. The separability of an arbitration agreement should be understood as a unique characteristic peculiar to the arbitration agreement.

## III-B. Assignment of an Arbitration Agreement

### III-B-1. Precedents

In Japan, there are several theories regarding the transfer of rights and obligations relating to an arbitration agreement when the main contract is assigned. In *To-chi-han* T7.10.19.,<sup>56</sup> the litigation was stayed on the grounds of the existence of an arbitration agreement, when the person who had succeeded to a pledge requested a stay of proceedings. The Tokyo District Court stated that an arbitration agreement was a contract to avoid litigation on disputes arising from specific legal relations, and the dispute on the pledge in this case was arising from specific legal relations. Consequently, whether the successor takes on general or specific rights and obligations, they should be bound by the arbitration agreement. In this case, it seems that an arbitration agreement was understood in the context of procedure, and the question of settlement of the specific dispute in the arbitration was emphasised more than who were the parties to the arbitration.

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<sup>55</sup> Koyama, Noboru. Chūsai-hō, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: p 100; Matsuura, Kaoru. “Chūsai-keiyaku no Shikkō.” Gendai Chūsai-hō no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1998: p. 184.

<sup>56</sup> *To-chi-han* T7.10.19. (Hyōron, Vol. 7: Minso p. 394) (Tokyo District Court’s Judgement on 19th October 1918).



On the other hand, in *Osaka-ku-han* T6.4.30.,<sup>57</sup> a request to stay court proceedings was refused when the third person, to whom rights relating to the rice dealing arising from the main contract were assigned, requested this on the basis of a fixed form of arbitration agreement. The Osaka District Court decided that the arbitration agreement bound only the parties to that agreement and did not bind the person to whom rights arising from the main contract were assigned. In this case, who were the parties to the arbitration was important rather than settlement of disputes arising from the specific legal relations in arbitration.

In *Osaka-kô-han* S59.5.29.,<sup>58</sup> the Osaka High Court decided that the arbitration agreement did not bind the endorser of the bill. The Court considered wording on the bill and its effect on the third person and the public. In this case, the question of who were the parties to the arbitration was also emphasised rather than settlement of disputes arising from the specific legal relations involved in the arbitration. Thus, understanding of assignment of an arbitration agreement with the assignment of the main contract is divided in Japan. On one view, there is a greater focus on arbitration, that is, the way of settling disputes, irrespective of who are the parties. This recognises the assignment of an arbitration agreement. Another view looks at who are the parties to the arbitration, and is unlikely to recognise the assignment.

## III-B-2. Relationship with Classification of an Arbitration Agreement

At the beginning, academics considered the first two older precedents, and concluded that an arbitration agreement could, in principle, be assigned with the assignment of the main contract unless the arbitration agreement was concluded on the basis of a special relationship between the parties. Therefore, this issue would have to be decided case by case.<sup>59</sup>

Then, on the basis of the classification of an arbitration agreement under the CPC, it was suggested that the same rules on succession of court litigation should be applied to the assignment of an arbitration agreement. Article 201 of the CPC provides that judgements *res judicata* bind the parties and their successors after the

<sup>57</sup> *Osaka-ku-han* T6.4.30. (Shinbun. No. 1268: p. 23) (Osaka District Court's Judgement on 30th April 1917).

<sup>58</sup> *Osaka-kô-han* S59.5.29. (Han-ta. Vol. 533: p. 166) (Osaka High Court's Judgement on 29th May 1984).

<sup>59</sup> Kaizuka, Yukio. "Chûsai-keiyaku no Kôryoku no Hani: Shukan-teki-hani o Chûshin ni." Gendai Chûsai-hô no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yûhikaku, 1998: p. 140 at 146; Kojima, Takeshi and Takakuwa, Akira ed. Chûkai Chûsai-hô. Tokyo: Seirin-shoin, 1988: p. 76.

oral proceedings. By analogy to this, an arbitration agreement can be assigned with the assignment of the main contract.<sup>60</sup>

On the other hand, some scholars suggest that an arbitration agreement should be assigned with the assignment of the main contract only when the parties to the main contract agree with the assignment of the arbitration agreement, and the other party agrees with it. If the other party refuses the assignment, the arbitration agreement becomes invalid.<sup>61</sup>

Basically, these interpretations concern only cases in Japan and do not consider cases involving international dealings. Unlike domestic dealings, it is more difficult to check the assignment of the main contract from the other party to the third person without notice from them. Then, agreement between the parties to the assignment of the main contract and from the other party as regards the assignment of the arbitration agreement seems to be necessary. This can be logically explained. In terms of the domestic law on arbitration, an arbitration agreement is classified as a contract under the CPC, different from the main contract under the CC. Therefore, an independent agreement as regards the assignment of the arbitration agreement is necessary. This interpretation is accepted in Russia.

## III-C. Kompetenz-Kompetenz

### III-C-1. Determination of its Own Competence

It is not clear whether or not arbitrators can determine their own competence in respect of the validity of an arbitration agreement in Japan. Professor Kojima implied that arbitrators could determine the validity of an arbitration agreement. Arbitrators must examine their own competence at some stage of the arbitration proceedings because arbitral awards made by arbitrators without competence are destined to be void, according to Article 801 of the Law on Arbitration.<sup>62</sup>

On the other hand, Professor Koyama stated that arbitrators need not and could not determine the validity of an arbitration agreement because they were not given such power by the parties.<sup>63</sup>

This divergence of views occurs because Article 797 of the Law on Arbitration provides only that arbitrators can carry on arbitration proceedings even if one party insists that the arbitration proceedings should be stopped in view of the

<sup>60</sup> Kaizuka, Yukio. "Chūsai-keiyaku no Kōryoku no Hani: Shukan-teki-hani o Chūshin ni." Gendai Chūsai-hō no Ronten. Kaoru Matsuura and Yoshimitsu Aoyama ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1998: p. 140 at 146-147.

<sup>61</sup> Koyama, Noboru. Chūsai-hō, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: p. 88.

<sup>62</sup> Kojima, Takeshi and Takakuwa, Akira ed. Chūkai Chūsai-hō. Tokyo: Seirin-shoin, 1988: p. 75.

<sup>63</sup> Koyama, Noboru. Chūsai-hō, 2nd ed. Tokyo: Kabushiki-gaisha Yūhikaku, 1994: pp. 110-111.

non-existence of a legally valid arbitration agreement, inadequate relationship between the arbitration agreement and the subject matter of the dispute or lack of competence of the arbitrators. Thus, Article 797 of the Law on Arbitration does not determine whether the arbitral tribunal should decide its own competence, nor whether the party can raise objections with arbitral tribunals or courts.

Article 797 suggests only that the arbitral proceedings should be continued, but does not stipulate whether or not arbitral tribunals should determine the validity of an arbitration agreement in the arbitral proceedings. The basis for continuing the arbitral procedure is, however, that the arbitral tribunal has the competence to do so. In a sense, the competence of the arbitral tribunal has already been very clearly shown by the existence of the arbitration itself. This temporary or permanent competence is also strongly supported by the principle of the separability of an arbitration agreement, which guarantees the existence of the valid arbitration agreement even if the main contract has been invalidated for some reason. Then, the arbitral tribunal need not decide its competence again.

On the other hand, there are some advantages in having the arbitral tribunal decide on competence. Both Article 797 of the Law on Arbitration and the principle of the separability of an arbitration agreement guarantee temporary competence only. If the arbitral tribunal determines its competence at the early stage of the arbitration, the parties can avoid wasting time and cost in the case of non-competence.

It is unanimously agreed that whether the arbitral tribunal determines its competence or the continuing arbitral proceedings pre-supposes its competence, decisions about competence of arbitral tribunals do not bind the courts. Therefore, it is desirable to accept the principle of *Kompetenz-Kompetenz*, that is, arbitral tribunals should determine their competence at some stage on the basis of the party's request.

### III-C-2. Relationship with Classification of an Arbitration Agreement

There is an issue of whether the party can make objections to arbitral tribunals or courts as regards the competence of the arbitral tribunals. It is generally understood that the party should raise their objections relating to jurisdiction with the arbitral tribunal, and cannot make an appeal directly to courts. The objection to the jurisdiction can in any case be examined by a court in appeals to the awards (Article 801 of the Law on Arbitration).<sup>64</sup> However, this may sometimes eventually bring an

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<sup>64</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai Chūsai-hō*. Tokyo: Seirin-shoin, 1988: pp. 144-

adverse decision of the courts at the very end of an appeal to arbitral awards. Therefore, arbitral tribunals should, at their discretion, suspend the arbitral proceedings until the court's decisions are issued if they consider this appropriate.<sup>65</sup>

In so far as an arbitration agreement is classified as a procedural contract under the CPC, the principle of *Kompetenz-Kompetenz* should be recognised for procedural expediency. Determination of the competence by the arbitral tribunal, has several advantages. First, it is very convenient that arbitral tribunals can determine their competence by themselves rather than refer the issue of competence to courts whenever this is requested by parties. According to Kuniyoshi Kashiwagi, it has been a principle since the period of the Roman Empire that matters of procedure should be determined by the tribunal itself.<sup>66</sup> Under Roman law which is regarded as the starting point of the civil procedure code, proceedings were divided into two stages, which were called *formula*. This system was well established by about 2 BC. Under the *formula* system, at the first stage, the *praetor* decided upon the appropriate procedure to be followed after hearing the parties, and at the second stage, the *judex* gave his decision on the merits.<sup>67</sup> This principle was accepted in the old German Civil Procedure Code. However such procedures gradually fell out of use because of the delay which they entailed. As the Roman substantive and procedural stages were brought together because of expediency, it was determined that the issue of competence, which is the basis of the arbitral procedure, should be examined by the arbitral tribunal itself.

Secondly, parties can avoid wasting time and money if they know that the arbitral tribunal does not have the competence during the arbitral proceedings, especially at the early stage.

As regards the arbitral tribunal's competence, in England, the parties can agree directly to ask a court to decide on the jurisdiction of the arbitral tribunal. The parties can also agree to request the arbitral tribunal's decision in either the preliminary or final award. In the absence of the parties' agreement, the arbitral tribunal has discretion to determine its own competence as regards either the preliminary or final award.

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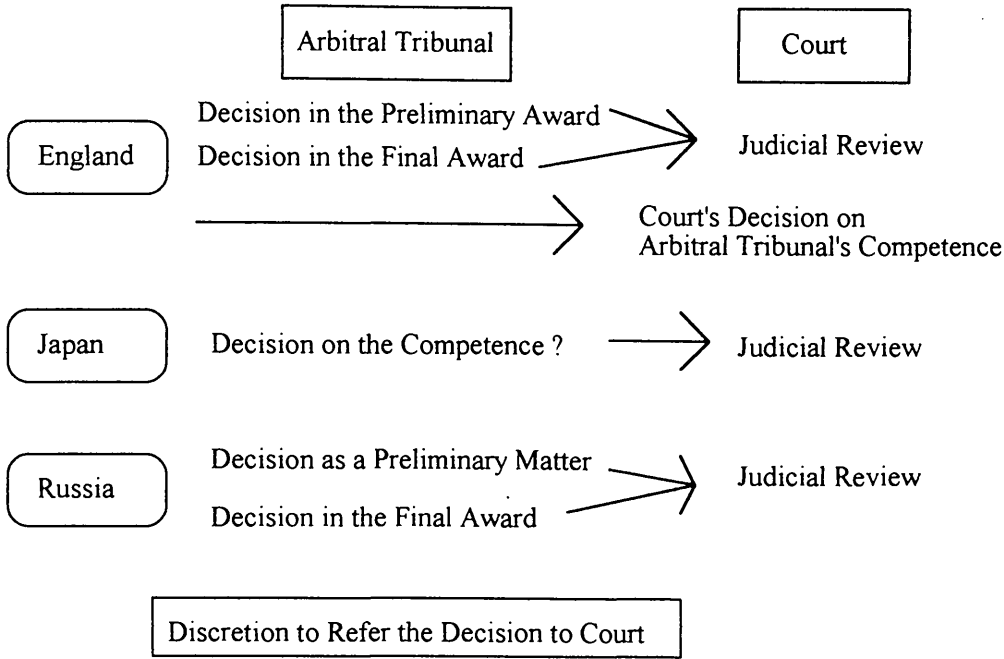
145.

<sup>65</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai Chūsai-hô*. Tokyo: Seirin-shoin, 1988:p. 144.

<sup>66</sup> Kojima, Takeshi and Takakuwa, Akira ed. *Chūkai Chūsai-hô*. Tokyo: Seirin-shoin, 1988:p. 143.

<sup>67</sup> Mackenzie, Lord. *Studies in Roman Law with Comparative Views of the Laws of France, England, and Scotland* 7th ed. Edinburgh: William Blackwood and Sons, 1898: pp 362-363.

Table C5-3 Judicial Review of Arbitral Tribunal's Decision on its Own Competence



In Russia, which introduced the UNCITRAL Model Law, the arbitral tribunal has a choice whether to decide its own competence as a preliminary matter at the early stage of the arbitral proceedings or in the final award (see, Table C5-3). In all three countries, the arbitral tribunal can, at its discretion, continue the arbitral proceedings while the court's review is pending.

In Japan, however, it is still not clear whether or not the arbitral tribunal should decide on its own competence. Not only in England but in the whole of Europe, there is a belief that arbitration is the common way to settle disputes. Thus, a wide range of powers can be granted to the arbitral tribunal as in the Arbitration Act 1996. The system of arbitration can, to a large degree, act as a court in England. Russia has put in place such a system by introducing the UNCITRAL Model Law. In Japan, arbitration is not a familiar method of dispute settlement. Therefore, there has been no strong incentive to grant wide powers to arbitral tribunals.

As mentioned above, in theory, in all three countries the arbitral tribunal can, at its discretion, continue the arbitral proceedings even if there is doubt about jurisdiction. In this case, if courts deny the jurisdiction on an appeal, all arbitral proceedings are in vain. This results in a considerable waste of time and money. Although arbitral tribunals should be careful about the court's intervention, they should have the discretion to ask for a decision regarding the tribunals own jurisdiction during the arbitral proceedings, in order to avoid having to seek the decision of courts at the very end of the process on the arbitration. This discretionary

power should be introduced in law in Japan.

One thing threatening to impinge on the convenience of the principle of Kompetenz-Kompetenz is abuse of objections relating to the jurisdiction of arbitral tribunals. In order to prevent this, a time-limit for objections to the jurisdiction of tribunals should be set.

### III-C-3. Time-Limit for Objections to Tribunal's Competence

On a literal interpretation of Article 797 of the Law on Arbitration, the parties may raise the issue of the competence of the arbitral tribunal at any stage. As mentioned above, a time-limit should be set in order for the principle of Kompetenz-Kompetenz to operate effectively. Otherwise, there is room for abuse of objections to the jurisdiction. In England and Russia, the party's right to object to the arbitral tribunal's jurisdiction is limited to a time before they answer the case on the merits. Both of these countries introduced similar rules as those under the UNCITRAL Model Law.

Rule 46 of the 1997 Commercial Arbitration Rules of the JCAA provides that a party who knows or ought to know that the arbitral proceedings have not been conducted properly and who fails to object without delay shall be deemed to have waived their right to object, provided that no party shall be deemed to have waived any right that it cannot waive. This may include an objection to the jurisdiction of the arbitral tribunal, and simply use the term "without delay."

The Draft Text of the Law of Arbitration prepared by the Arbitration Law Study Group in 1989 basically took the same approach. Section 20(2) provides that a plea that an arbitrator does not have jurisdiction in whole or in part cannot be raised after an answer on the merits has been submitted by the respondent. Section 20(3) provides that a ruling that the arbitrator has jurisdiction can only be disputed by way of an application to set aside the arbitral award or by way of defence where one party confronts an objection to the arbitral award.

In the case of Section 20(3), sometimes jurisdiction may be denied by a court after the long adversary arbitral proceedings are finished. To avoid this, the arbitral tribunal should be granted discretion to refer the decision as regards its own jurisdiction to courts if necessary.

The principle of Kompetenz-Kompetenz, that is, determination of the competence by the arbitral tribunal, is convenient in that it is more time and cost-effective than referring the issue of competence to courts whenever this is requested

by parties. Abuse of the right to object to the arbitral tribunal's jurisdiction will remove this convenience. Therefore, in order to minimise the abuse, a time-limit for objections to the jurisdiction should be set, especially in Japan.

## III-D. Stay of Court Proceedings

### III-D-1. Precedents

The law on arbitration in Japan does not clearly provide for a stay of court proceedings on the grounds of the existence of an arbitration agreement. The general principle of a stay of court proceedings is recognised in the 1953 case of *Tokyo-chi-han* S28.4.10.,<sup>68</sup>. The court stated that:

“It is a well-established principle in the 1890 Japanese CPC that courts stay proceedings where there is an arbitration agreement... The reason why the existence of an arbitration agreement will lead a court to stay proceedings is that arbitration is the process by which the parties promise to obey decisions made by private persons, that is, arbitrators, instead of judicial proceedings. Consequently, it functions as an alternative to court proceedings. Therefore, in so far as the parties express their intention to resort to arbitration, the court should respect the parties' intention and make them settle disputes voluntarily, which is also advantageous to the state.”<sup>69</sup>

Three reasons for staying court proceedings on the grounds of the existence of an arbitration agreement were outlined in this case. From the court's viewpoint, first, arbitration provides an alternative to court proceedings, and secondly, voluntary settlement by arbitration is advantageous to the state. From the parties' point of view, there is an agreement to arbitrate disputes on the basis of the parties' autonomy. The implications of staying court proceedings are explored in the relevant cases.<sup>70</sup>

Arbitration should be recognised as a means of dispute settlement independent of and parallel with court litigation. In this sense, from the court's side, the court should stay court proceedings on the grounds of the existence of an arbitration agreement. However, court litigation also exists as a means of dispute

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<sup>68</sup> *Tokyo-chi-han* S28.4.10. (*Ka-min-shû* Vol. 4, No. 1-6, 1953: p. 502) (Tokyo District Court's Judgement on 10th April 1953).

<sup>69</sup> *Id.*, at 507.

<sup>70</sup> See, Kojima, Takeshi and Takakuwa, Akira ed. *Chûkai Chûsai-hô*. Tokyo: Seirin-shoin, 1988: p. 69.

settlement parallel with arbitration. Therefore, the stay should be realised only when a request is put by a party to the court.<sup>71</sup>

Parties must respect the agreement to arbitrate. It seems that the principle of staying court proceedings is recognised in order to provide for the interests of both the parties and the courts. In this sense, the Law on Arbitration provides for the co-operation of the court in arbitration under Article 796. Therefore, the court should stay the litigation on the grounds of a transfer of jurisdiction, if one of the parties requests this on the basis of the arbitration agreement.<sup>72</sup> The principle should not be regarded merely as banning an action (Article 142 of the 1996 CPC) regarding the same matter (Article 262(2) of the 1996 CPC).<sup>73</sup>

It is also true that the national court functions as the ultimate protector of rights in society. In this sense, this is a broader issue: to what extent should the court recognise the reasonableness of staying court proceedings?

The case of *Tokyo-chi-han* S28.4.10.,<sup>74</sup> divided classifications under the law on arbitration and under international private law. Under the law on arbitration, an arbitration agreement was classified as a contract under the CPC and the issue of a stay of court proceedings was examined by the CPC. On the other hand, under international private law, it was classified as an ordinary contract. Its validity was examined by the American inter-state law. Thus, the principle of the separability of an arbitration agreement was first recognised under the American law. Then, because of the existence of a valid arbitration agreement, the principle of a stay of court proceedings could be recognised on the basis of procedural classification of an arbitration agreement under the Law on Arbitration in Japan.

## III-D-2. Relationship with Classification of an Arbitration Agreement

Since classifications under the Law on Arbitration and international private law were separated, application of an arbitration agreement governed by foreign law under the Law on Arbitration in Japan was disputed in 1959. In *Osaka-chi-han* S34.5.11.,<sup>75</sup> the defendant, Sankô-kisen Co. Ltd., concluded a shipping contract to

<sup>71</sup> See, *Osaka-kô-han* S49.2.20. (*Han-ji*, No. 746: p. 42 at 43) (Osaka High Court's Judgement on 20th February 1974); *Tokyo-chi-han* S48.10.29. (*Han-ji*, No. 736: p. 64 at 65) (Tokyo District Court's Judgement on 29th October 1973).

<sup>72</sup> *Tokyo-kô-han* T11.4.29. (*Shinbun*, No. 2005: p. 17) (Tokyo High Court's Judgement on 29th April 1922).

<sup>73</sup> Koyama, Noboru. *Chûsai-hô*, 2nd ed. Tokyo: Kabushiki-gaisha Yûhikaku, 1994: p. 81.

<sup>74</sup> *Tokyo-chi-han* S28.4.10. (*Ka-min-shû* Vol. 4, No. 1-6, 1953: p. 502) (Tokyo District Court's Judgement on 10th April 1953).

<sup>75</sup> *Osaka-chi-han* S34.5.11. (*Ka-min-shû*, Vol. 10: p. 970) (Osaka District Court's Judgement on 11th



forward phosphate rocks with the plaintiff, L. London & Co. Ltd., and issued a bill of lading in January 1958. However, the rocks were contaminated during the shipping, and the plaintiff claimed compensation in a Japanese court. There was an arbitration agreement providing that “all disputes arising under this Charter” should be settled by arbitration in London. Therefore, the defendant requested a stay of court proceedings. The plaintiff insisted that the terms “all disputes arising under this Charter” did not include disputes on compensation, and also that the Law on Arbitration regulated only domestic arbitration, and consequently could not be applied to arbitration involving international dealings. This was because Article 800 of the Law on Arbitration provides that arbitral awards shall be regarded as the same as court judgements *res judicata*. Since arbitral awards are regarded as the same as court judgements, all provisions in the Law on Arbitration should be exclusively applied to domestic arbitration only.

The Osaka District Court decided that the arbitration clause covered the dispute on compensation, and that arbitration was the alternative method of dispute settlement to court litigation on the basis of the agreement of the parties. Although the Law on Arbitration regulated arbitration in Japan, in so far as domestic or foreign arbitration was based on the agreement of the parties, there was no reason to refuse to recognise arbitration involving foreign parties in Japan. Considering the developments in international trade and the conclusion by Japan of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (1927 Geneva Convention), the Law on Arbitration should be positively applied to give effect to foreign arbitration agreements.<sup>76</sup> Consequently, application of the Law on Arbitration as regards foreign arbitration agreements was clearly recognised. Recently, this issue has been covered by Article II of the 1958 New York Convention, and Japanese courts stay proceedings in accordance with the Convention.<sup>77</sup>

Thus, an arbitration agreement under foreign law can be the basis for a stay of court proceedings under the Law on Arbitration in Japan, which classifies an arbitration agreement as a procedural contract. It is the arbitration agreement that makes it possible to connect foreign law with Japanese procedural law which regulates exclusively domestic court-control over arbitration in Japan. An arbitration agreement has its own unique characteristics. In this sense, an arbitration agreement should be understood in the context of the *sui generis* theory, and issues relating to arbitration should be solved in the specific regime of international commercial

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May 1959).

<sup>76</sup> *Id.*, at 982-983.

<sup>77</sup> Iwasaki, Kazuo. "Conducting International Commercial Arbitrations in Japan." International Arbitration Law Review. Vol. 1, No. 3: p. G-11 at G-13.

arbitration.

### III-D-3. Stay under Other Conditions

As mentioned above, alternative methods of dispute settlement such as arbitration are independent of and parallel with court litigation. The principle of a stay of proceedings should, therefore, be recognised for other alternative methods of dispute settlement such as mediation (*assen*) and conciliation (*chôtei*). In *Tokyo-chi-han* S50.5.29.,<sup>78</sup> the Tokyo District Court stated that an agreement for mediation or conciliation should bind the parties in the same way as an arbitration agreement.

### III-D-4. Time-Limit of Request of Stay

In terms of the time-limit for requesting the stay, the case law is divided. In *Tokyo-chi-han* S50.5.15.,<sup>79</sup> the court decided that the party lost the right to ask for the stay after making a pleading on the dispute in the court litigation.

Several cases focus not simply upon the formal fact of making an oral pleading but on the intention of the party. In *Tokyo-chi-han* S45.7.15.,<sup>80</sup> the Tokyo District Court stated that the party should lose the right to ask for a stay after making a pleading on the dispute in the court litigation. However, in this case, where the party had already submitted a defence but had not made a pleading, the court recognised a stay on the grounds that it was difficult to conclude that the party intended to abandon the right of a stay.

Similarly, in *Osaka-kô-han* S49.2.20.,<sup>81</sup> the Osaka High Court stated that the party lost the right to request a stay if the court could conclude that the party had the intention of abandoning their rights. In this case, the Court did not recognise the stay, because the district court had already issued a judgement without the participation of the appellant.

On the other hand, in *Tokyo-chi-han* S48.10.29.,<sup>82</sup> the court stated that the party could ask for a stay until the end of the oral proceedings, unless it was requested in order to delay the legal proceedings, or it was contrary to natural justice.

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<sup>78</sup> *Tokyo-chi-sai* S50.5.29. (*Han-ji*. No. 801: p. 59) (Tokyo District Court's Judgement on 29th May 1975).

<sup>79</sup> *Tokyo-chi-han* S50.5.15. (*Han-ji*. No. 799: p. 62) (Tokyo District Court's Judgement on 15th May 1975).

<sup>80</sup> *Tokyo-chi-han* S45.7.15. (*Han-ji*. No. 614: p. 73) (Tokyo District Court's Judgement on 15th July 1970).

<sup>81</sup> *Osaka-kô-han* S49.2.20. (*Han-ji*. No. 746: p. 42) (Osaka High Court's Judgement on 20th February 1974).

<sup>82</sup> *Tokyo-chi-han* S48.10.29. (*Han-ji*. No. 736: p. 65) (Tokyo District Court's Judgement on 29th October 1973).

It took the view that the provision on responding jurisdiction (Article 26 of the 1890 CPC) does not apply to such a case, and consequently, making a pleading does not necessarily mean losing the right to ask for a stay.

Section 9 of the Draft Text of Law of Arbitration provides for a stay of court proceedings, but does not provide for a time-limit for doing so. The Arbitration Law Study Group explained that the party should, in principle, request a stay before arguing the merits of the disputes, but if there was no mistake in not requesting a stay before arguing the merits of the dispute, the party can request a stay.<sup>83</sup>

It seems that Japanese courts are granted some discretion to take into account lack of familiarity with arbitration and its practice in Japan. Consequently, the court needs to investigate further the party's real intention rather than simply look at whether the party made a pleading or argued the merits of the dispute, which deprives the party of the right to request a stay.

The cases mentioned above all concerned domestic arbitration. If international elements are involved in arbitration, courts should not consider lack of familiarity with arbitration and its practice in Japan, which may bring unexpected results for foreign parties. In this regard, domestic arbitration and international arbitration should be separated in Japan.

As mentioned above, although an arbitration agreement is classified as a contract under substantive law in terms of international private law, its effects are exclusively governed by procedural law in Japan. If an arbitration agreement is subject to the 1958 New York Convention, a stay may be granted on the basis of Article II. In this case, it is unlikely that Japanese courts take lack of familiarity with arbitration into account. However, if an arbitration agreement with international elements is not subject to the 1958 New York Convention, such cases simply fall into the Japanese CPC, which does not distinguish domestic and international arbitration. Then, considering the traditional practice of Japanese courts, courts must take into account the familiarity and popularity of arbitration in each society. Obviously there is a gap between the general perception of arbitration in the Japanese society and general perception in European countries or in the international business community. Therefore, domestic and international arbitrations should be clearly separated by law in Japan, and the formal requirements of an arbitration agreement should be strictly applied in international arbitration. The UNCITRAL Model Law takes this approach. Japanese courts need not study the legal sociology on arbitration in each country in the event that arbitration involves foreign parties.

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<sup>83</sup> Chûsai-kenkyû-kai ed. Bessatsu NBL No. 25: Chûsai-hô no Rippô-ron-teki-kenkyû: Chûsai-shian to sono Kaisetsu. Tokyo: Shôji-hômu-kenkyû-kai, 1993: p. 63.

## Chapter 6. Russia

# I. Classification of an Arbitration Agreement

## I-A. Historical View

### I-A-1. Treteiskii Court under the CPC

As mentioned in the previous chapter, in Japan, classification under domestic law on arbitration is distinguished from that under international private law. In Russia, on the other hand, it seems that such distinction is not necessary, because international commercial arbitration has traditionally been separated from domestic commercial arbitration. As a result, the classification of an arbitration agreement with international elements can be achieved under rules or law on international commercial arbitration. There were significant reasons for this distinction between domestic and international arbitrations in Russia.

It seems that, originally, international commercial arbitration was covered by civil procedure code under the USSR regime. Under the New Economic Policy (NEP), socialist and capitalist economic systems co-existed, and consequently a new social structure was created.<sup>1</sup> During this time, the private sector enjoyed short-lived foreign trade dealings.<sup>2</sup> In accordance with the NEP, the new Civil Procedure Code was approved on 7th July 1923 (hereinafter referred to as the 1923 CPC).<sup>3</sup> Under the 1923 CPC, arbitration was called treteiskii court. In order to provide detailed rules for the treteiskii court, the Statute on the Treteiskii Court was enacted on 16th October 1924 as an Appendix to the 1923 CPC (hereinafter referred to as the 1924 Statute on the Treteiskii Court).<sup>4</sup> It did not allow, however, the exclusive reference of future disputes to the treteiskii court. Article 2 of the 1924 Statute on the Treteiskii Court provided that an agreement to submit to arbitration all disputes which may arise in the future should not deprive parties of the right to apply to the

<sup>1</sup> Fujita, Isamu. Gaisetsu Sobieto-hô. Tokyo: Tokyo-daigaku-shuppan-kai, 1986: p. 16.

<sup>2</sup> Fensterwald Jr., Bernard. "Sovereign Immunity and Soviet State Trading." Harvard Law Review. Vol. 63, 1950: p. 614 at 627-8.

Foreign trade had to be done through the system of licensing of the state or through branches of the Commissariat of Foreign Trade.

<sup>3</sup> Ioffe, O. C. ed. Solok let Sovetskogo Prava 1917-1957 Tom I. Leningrad: Isdatel'stvo Leningradskogo Universiteta, 1957: p. 653.

It came into force on 1st September 1923. The new Civil Code was also enacted previous year. It was the first civil code in the 20th century (Inako, Tsuneo. "Roshia-renpô-minpô-ten (dai-ichi-bu)." Shakai-shugi-hô no ugoki. Vol. 80. 1995: p. 15).

<sup>4</sup> See, e.g. Gsovski, Vladimir. Soviet Civil Law Vol. 2. Michigan: University of Michigan Law School, 1949: pp. 663-7.

proper court under the general rules of the 1923 CPC.

The above provisions could be applied in the event of international commercial disputes.<sup>5</sup> And indeed, the Economic Treaty between the Soviet Union and Germany on 12th October 1925, for example, had a provision on arbitration (treteiskii settlement, *третейский разбирательство*).<sup>6</sup>

## I-A-1. FTAC under the Specific Regime of International Commercial Arbitration

After the NEP, the 1924 Statute on the Treteiskii Court became defunct, and then ordinary courts heard international commercial cases. However, they lacked experience to solve complex foreign trade disputes.<sup>7</sup> Because of problems regarding the validity of agreements to arbitrate future disputes and frustrated encounters with the decisions of foreign arbitrations who denied sovereign immunity to state organisations engaging in commercial operations,<sup>8</sup> the Soviet government decided to establish permanent international arbitration courts in Moscow whose basic rules were independent of the 1924 Statute on the Treteiskii Court under the 1923 CPC. Therefore, the new term "arbitration" (*арбитраж*) was used instead of the treteiskii court, which was basically used for domestic arbitration after that.

There were several other reasons for establishing permanent international arbitration courts. First of all, the USSR used its economic superiority of a state trading monopoly as a means of forcing the choice of arbitration in the USSR.<sup>9</sup> Secondly, there was a universal trend towards arbitration as the most suitable method of settling international commercial disputes and consequently, it was necessary to train legal personnel. Trials involving international commercial disputes in foreign national courts were regarded as having the disadvantages, whether real or imaginary, of expense, delay, rigid formality, publicity, unfriendly atmosphere, and

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<sup>5</sup> Pisar, Samuel. "The Communist System of Foreign-Trade Adjudication." *Harvard Law Review*. Vol. 72, No. 8, June 1959: p. 1409 at 1459.

<sup>6</sup> Uckov, V. P. ed. *Sbornik raz'yasnenii Verkhovnogo Suda RSFSR*, 4th ed. Moscow: Gosudarstvennoe Izdatel'stvo Sovetskoe Zakonodatel'stvo, 1935: p. 148.

<sup>7</sup> Butler, William E. *Arbitration in the Soviet Union*. London: Oceana Publications Inc., 1989: p. vi.

<sup>8</sup> Fensterwald Jr., Bernard. "Sovereign Immunity and Soviet State Trading." *Harvard Law Review*. Vol. 63, 1950: p. 614 at 635-636.

For example, under Article 9 of the Economic Treaty between the Soviet Union and Germany, the Soviet Union agreed to accept responsibility for acts of the state committed by its trade delegations, or acts committed by other Soviet organisations in Germany. Therefore, when German engineers who had signed employment contracts with the Orga Metals Company attempted to sue the Soviet delegation for breach of those contracts, sovereign immunity of the Soviet government was denied.

<sup>9</sup> Pisar, Samuel. "The Communist System of Foreign-Trade Adjudication." *Harvard Law Review*. Vol. 72, No. 8, June 1959: p. 1409 at 1415.

the parochialism of national judges.<sup>10</sup>

First, the Maritime Arbitration Commission (MAC) attached to the All-Union Chamber of Commerce and Industry (CCI) was founded on 13th December 1930.<sup>11</sup> Next, the Foreign Trade Arbitration Commission was founded attached to the All-Union CCI on 17th June 1932 by the Statute of the Central Executive Committee and the Council of People's Commissars of the USSR.<sup>12</sup> The FTAC is one of the oldest permanent international commercial arbitral institutions in the world.<sup>13</sup>

The 1932 Statute on the FTAC stated that the FTAC was founded in order to settle, by way of arbitral examination, disputes which arose from legal transactions in foreign trade, in particular disputes between foreign firms and Soviet economic organisations (Article 1).

The system of arbitration under the provisions added to the 1923 CPC, which was similar to ordinary international commercial arbitration in Western countries, was short-lived and replaced by the unique Soviet system of arbitration, and was in practice, firmly incorporated as part of the national legal system. Indeed, this distinction of international commercial arbitration has continuously succeeded to the recent 1993 Law on the ICA.

Since international commercial arbitration is separated from domestic commercial arbitration, classification of an arbitration agreement must be made in the international context, in so far as international commercial arbitration is concerned. Unlike in Japan where classification of an arbitration agreement under the domestic law on arbitration and that under international private law are separated, an arbitration agreement in international commercial arbitration is classified under rules or law in the specific regime of international commercial arbitration in Russia. Since classification of an arbitration agreement is achieved in the international context, this classification can naturally be applied to cases in terms of international private law.

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<sup>10</sup> Id., at 1416.

<sup>11</sup> Sobranie Zakonov i Rasporyazhenii SSSR, No. 60, 1930: Item 637; amended. No. 2, 1933: Item 12; No. 24, 1936: Item 222; Sobranie Postanovlenii Pravitel'stva SSSR, No. 7, 1960: Item 47.

The MAC also deals with domestic disputes arising from maritime affairs. Since this paper focuses on international commercial arbitration as mentioned above, information of the MAC will be mentioned only where it is necessary to understand international commercial arbitration in Russia.

<sup>12</sup> Sobranie Zakonov i Rasporyazhenii SSSR, No. 48, 1932: Item 281.

<sup>13</sup> E.g., The London Court of International Arbitration (LCIA) was inaugurated as "the London Chamber of Arbitration" in 1892 (LCIA ed. An Introduction to the LCIA, London: Barnard & Westwood Ltd., 1995: p. 5). The ICC International Court of Arbitration was established in 1923 (ICC ed. ICC International Court of Arbitration, 2nd ed., Paris: ICC International Court of Arbitration, 1996: p. 1). The American Arbitration Association (AAA) was established in 1926, and the Japan Commercial Arbitration Association (JCAA) was founded in 1950.

## I-B. Four Kinds of Classification

The argument of classification usually attempts to clarify the overall function of arbitration rather than to focus upon the nature of an arbitration agreement.<sup>14</sup> It may serve to indicate the general attitude of the national legal system to arbitration.<sup>15</sup> However, like the Japanese classification, the Russian classification of the overall function of arbitration has practical effects upon the classification of an arbitration agreement, which significantly influences interpretation of the law on arbitration and determination of the law applicable to it under international private law.

There are four possible theories in Russia as to the nature of an arbitration agreement in the international context: the contractual theory (*договорная теория*), the procedural (*процессуальная*), the mixed (*смешанная*) and the original or sui generis (*автономная*).<sup>16</sup> Although four kinds of classification are similar with that in Japan, details are slightly different. There is no controversy as to whether or not an arbitration agreement is a contract under civil code or civil procedure code in Russia.

The contractual theory regards an arbitration agreement as an ordinary contract and thus emphasises the principle of the autonomy of the parties. The Russian jurist, A. I. Minakov, explained that:

"The contractual theory concludes that the parties can themselves define the rules of dispute settlement. If the rules of the dispute settlement are not defined by the parties, the contractual theory allows acceptance of the rules of conflict of laws on the basis of international private law. Consequently, when substantive or procedural questions arising out of the arbitration agreement are being decided, norms of foreign countries may be recognised."<sup>17</sup>

Under the procedural theory, unlike in Germany or Japan where academics dispute whether an arbitration agreement is a contract governed by the civil code or by the civil procedure code, in Russia, an arbitration agreement is regarded as being

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<sup>14</sup> See, e.g., Minakov, A. I. Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov. Moscow: Yuridicheskaya literatura, 1985: pp. 77-85; David, René. Arbitration in International Trade. London: Kluwer Law and Taxation Publishers, 1985: pp. 76-78; Chukwumerije, Okezie. Choice of Law in International Commercial Arbitration. London: Quorum Books, 1994: pp. 9-15.

<sup>15</sup> Id., Chukwumerije, at 9.

<sup>16</sup> Minakov, A. I. Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov. Moscow: Yuridicheskaya literatura, 1985: p. 78.

<sup>17</sup> Id., at 78-79.

determined by administrative or national jurisdiction rather than in the context of contract. For example, there is a provision for friendly settlement (*мировое соглашение*) of disputes in the Russian Civil Procedure Code (Article 34), which is established by the agreement of the parties on condition that there should be no dispute as to civil rights.<sup>18</sup> This is not, however, regarded as a contract in Russia.

Similarly, an arbitration agreement is also never regarded as a contract in the Civil Procedure Code in the USSR. Under the procedural theory, an arbitration agreement is regarded as an agreement with procedural characteristics which refers to an exceptional type of jurisdiction of the state courts.<sup>19</sup> Consequently, the validity of an arbitration agreement must be determined by reference to state law. Arbitrators should be bound not by the arbitration agreement between the parties but by state law. One important difference from the state legal system is that arbitrators are appointed by the parties.

The mixed theory regards an arbitration agreement as having both contractual and procedural characteristics. It closely examines the process of the coming into being of an arbitration agreement, and divides the constituent elements of the arbitration into contractual and procedural characteristics. The question of the capacity of the parties to enter into an arbitration agreement and the question of validity of an arbitration agreement have contractual characteristics; and they can be determined by the rules of conflict of laws. On the other hand, the questions of the validity of arbitral proceedings and the staying of court proceedings where there is an arbitration agreement, are procedural matters and they must be determined exclusively by the law of the country where the arbitration is held.<sup>20</sup> Professor L. A. Lunts, a leading expert on Soviet international private law, follows the mixed theory.<sup>21</sup>

The original or *sui generis* theory insists that the characteristics of arbitration are influenced by the rapidity and convenience of the procedure in accordance with actual needs of the parties. Considering the practical demands of the parties, the characteristics of arbitration are not classified as contractual, procedural nor mixed, but of an original nature. Following the *sui generis* theory, the delocalisation theory, in which disputes are solved by the international commercial law, can be

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<sup>18</sup> Kallistratova, R. F., Lesnitskaya, L. F. and Puchinskii, V. K. ed. Kommentarii k GPK RSFSR. Moscow: Yuridicheskaya Literatura, 1976: p. 62.

<sup>19</sup> Minakov, A. I. Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov. Moscow: Yuridicheskaya literatura, 1985: p. 79.

<sup>20</sup> Id., at 82-83.

<sup>21</sup> Lunts, L. A. "Conflict of Laws in International Sale: Theory and Practice of Socialist Countries." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 114, I, 1965: p. 1 at 40.



developed.<sup>22</sup>

There has been controversy as regards classification of an arbitration in Russia. The controversy seems to shift from contractual-procedural to procedural-sui generis, as discussed below.

## II. Under International Private law

### II-A. Law Applicable to the Capacity of Parties to Enter into an Arbitration Agreement

#### II-A-1. Capacity of a (Natural) Person

##### II-A-1-a. Under the Russian Civil Code

There has always been disagreement regarding the classification of arbitration in Russia. However, the law applicable to the capacity to enter into an arbitration agreement has always indisputably been the rules of capacity to enter into ordinary contracts under the civil code. There is no controversy as to whether the capacity of parties to enter into a contract is determined by the civil code or the civil procedure code as in Japan or Germany. This is because, primarily, there were no provisions on contracts under the 1964 CPC.

In the USSR, the FTAC applied the law of the person's domicile in question concerning the capacity of a person to enter into an arbitration agreement. The principle of applying the law of domicile is still used by the ICAC today. The basis is Section VII of the Fundamental Principles of Civil Legislation of the USSR and Republics enacted on 31st May 1991 (hereinafter referred to as the 1991 Principles of the CL). Article 160-2 provides that the civil dispositive legal capacity of a foreign citizen shall be determined according to the law of the country of which he or she is a citizen.

The FTAC, AC and its successor ICAC apply the law of the person's domicile in the examination of the capacity of a person to enter into an arbitration agreement. If the civil dispositive legal capacity of a foreign citizen is with respect to a transaction concluded in Russia, legal capacity is determined according to Russian law (Article 160-4 of the 1991 Principles of the CL). The law applicable here derives from the rules on capacity to enter into an ordinary contract under the civil code, not a contract under the civil procedure code as in Japan.

##### II-A-1-b. Application of the Russian Civil Codes

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<sup>22</sup> Id., at 84.

The application of the civil code in Russia is still complex. The Statute of the Supreme Soviet of the RF on 14th July 1992 officially reinstated the 1991 Principles of the CL established on 31st May 1991 as being in force until the enactment of a new Civil Code of the RF except for the provisions establishing the powers of the USSR in the domain of civil legislation and conflicts with the Constitution of the RF and legislative acts of the RF adopted after the Declaration of State Sovereignty of 12th June 1990. The 1964 CC was also to apply to civil legal relations in so far as its provisions were not contrary to the legislative acts of the RF adopted after 12th June 1990 and other acts prevailing in the territory of the RF under the established procedures.<sup>23</sup>

Later, the Statute of the Supreme Soviet of the RF on 3rd March 1993 provided that the 1991 Principles of the CL could only be applied to the cases of civil rights and obligations which had arisen after 3rd August 1992.<sup>24</sup>

When Part 1 of the new Civil Code was enacted on 21st October 1994 (the 1994 CC), the Law on the Introduction of Part 1 of the 1994 CC provided that the followings provisions of the 1964 CC would lose their validity (Article 2): Part I General Provisions; Part II Law of Property; Part III Law of Obligation. Similarly, the following parts of the 1991 Principles of CL would cease to be valid (Article 3): Part I General Provisions; Part II Right of Ownership. Other Rights to Things; Part III Law of Obligations.

Subsequently, Part 2 of the 1994 CC was enacted on 22nd December 1995. Parts 1 and 2 of the 1994 CC do not mention rules of conflict of laws. Therefore, for the rules on conflict of laws, reference must still made to Part IIX of the 1964 CC and Part VII of the 1991 Principles of CL, which are not declared as invalid. To sum up, the law applicable to capacity to enter into an arbitration agreement is the law of the party's domicile based on Articles 160-2 and 161 of the 1991 Principles of the CL.

## II-A-2. Capacity of a Juridical Person

As regards the general legal capacity of a juridical person, the FTAC and ICAC applied the law of the country where the juridical person was formed. This principle was advantageous to the Soviet regime, because it could, in a sense, expand Soviet domestic law over activities of Soviet organisations abroad and limit state liability.<sup>25</sup>

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<sup>23</sup> Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF, No. 30, 1992: Item 1800.

<sup>24</sup> Vedomosti S"ezda Narodnykh Deputatov RF i Verkhovnogo Soveta RF, No. 11, 1993: Item 393.

<sup>25</sup> Pisar, Samuel. "Soviet Conflict of Laws in International Commercial Transactions." Harvard Law

In *Soyuznefteeksport v. A. Moroni and A. Keller*,<sup>26</sup> an Italian company, A. Moroni and A. Keller, made a contract with a Soviet foreign-trade organisation. However, the Italian company later insisted that it had no competence to make the contract because the Board of the Company did not authorise the agent to conclude the contract. The FTAC decided that the sole criterion for the examination of the capacity of A. Moroni and A. Keller was Italian law and the constitution of the company.<sup>27</sup> The validity of the contract was, however, recognised, because the President of the Italian company recognised the validity of the contract by partial performance. The FTAC concluded that the signature by the President alone could represent authorisation of the Board of the Company to conclude foreign transactions, according to both the constitution of the company and Italian law.

Article 161 of the 1991 Principles of the CL provides that civil legal capacity of foreign juridical persons shall be determined according to the law of the country where the juridical person was founded. However, the ultra vires doctrine has been, to some extent, weakened in the 1991 Principles of the CL. Article 161-2 provides that a foreign juridical person cannot refer to limitation of powers of its organ or representative which is not known to the law of the country in which the organ or a representative of a foreign juridical person concludes a transaction. Therefore, if the constitution of a foreign company imposes limits on foreign transactions, including conclusion of an arbitration agreement, in Russia, their validity may nonetheless be determined by the law of the country where the transaction was made, if such limits are not known to the law of the country in which the organ or a representative of a foreign juridical person concludes a transaction.

## II-B. Law Applicable to an Arbitration Agreement

### II-B-1. Under the Contractual and Procedural Theories

The argument of classification usually attempts to clarify the overall function of arbitration rather than to focus upon nature of an arbitration agreement.<sup>28</sup>

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Review, Vol. 70, No. 4, 1957: p. 593 at 642.

<sup>26</sup> *Soyuznefteeksport v. A. Moroni and A. Keller*. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission." International Commercial Arbitration: Soviet Commercial and Maritime Arbitration. New York: Oceana Publications, Inc., 1980: Case No. 75-76.

<sup>27</sup> Minakov, A. I. Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov. Moscow: Yuridicheskaya literatura, 1985: p. 97.

<sup>28</sup> See, e.g., Minakov, A. I. Arbitrazhnye soglasheniya i praktika rassmotreniya vneshneekonomicheskikh sporov. Moscow: Yuridicheskaya literatura, 1985: pp. 77-85; David, Rene. Arbitration in International Trade. London: Kluwer Law and Taxation Publishers, 1985: pp. 76-78; Chukwumerije, Okezie. Choice of Law in International Commercial Arbitration. London: Quorum

Classification of an arbitration agreement is necessary to determine the law applicable to it under international private law. It has practical significance mainly for this purpose, although it may also serve to indicate the general attitude of the national legal system to arbitration.<sup>29</sup>

In Russia, classification of an arbitration agreement for determination of the law applicable to it is based on the Russian concept. This is in harmony with the traditional method of classification for determination of applicable law in Russia. L. A. Lunts supported classification based on the legal concepts under the law of forum considering equality of legal systems.<sup>30</sup> Recently, Article 1224 of the Draft International Private Law in the Russian Civil Code provides that unless otherwise stipulated by a law, in making a determination of applicable law, a court looks to the interpretation of legal concepts in accordance with the law of the country of the court.<sup>31</sup>

There was controversy in particular as to whether an arbitration agreement had contractual or procedural characteristics in the USSR.<sup>32</sup> It seems that under the USSR regime, the main feature determining the nature of an arbitration agreement was whether Soviet parties were involved in the case or not. In cases of disputes between foreign parties, the FTAC clearly followed the contractual theory and applied the law of the country where the arbitration agreement was concluded.

In the case of *O. Mayer of Switzerland v. Cogis of Italy*<sup>33</sup> in 1964, the FTAC applied the law governing an ordinary contract of a foreign country. In the case, Cogis insisted that the FTAC had no competence since the arbitration agreement was invalid according to Italian law. There was no agreement as to the law governing the arbitration agreement. The FTAC decided that the arbitration agreement was concluded in Milan, consequently Italian law should be applied. The FTAC concluded that the parties failed to observe the conditions requiring for signing the contract, stipulated by the Italian Civil Code in provisions concerning international transactions and that therefore the arbitration agreement had no legal effect and was null and void. Furthermore, Article 2 of the Italian Civil Procedure Code basically

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Books, 1994: pp. 9-15.

<sup>29</sup> Id., Chukwumerije, at 9.

<sup>30</sup> Boguslavskii, M. M. ed. Mezhdunarodnoe Chastnoe Pravo: Sovremennye Problemy Kniga 1. Moscow: Nauka, 1993: p. 73.

<sup>31</sup> "Draft the Civil Code of the Russian Federation: Part Three Section VII. Private International Law." Review of Central and Eastern European Law. Vol. 22, No. 6, 1996: p. 661.

<sup>32</sup> See, controversy between Ramzaitsev and Becker. Hobér, Kaj, "Arbitration in Moscow." Arbitration International. Vol. 3, No. 2, 1987: p. 119 at 132.

<sup>33</sup> *O. Mayer, of Switzerland v. Cogis, of Italy*. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission." International Commercial Arbitration: Soviet Commercial and Maritime Arbitration. New York: Oceana Publications, Inc., 1980: Case No. 125.

did not permit withdrawal from the Italian jurisdiction, if one of the parties were an Italian citizen permanently residing in Italy.

In the similar case of *V/O Prodimtorg v. Kobechev of Italy*, on the other hand, the FTAC recognised its jurisdiction, because it applied the Soviet-Italian Treaty on Trade and Navigation of 1948. Its Article 21 provided that both countries should recognise any agreement on arbitral settlement on disputes connected with trade concluded by their citizens and juridical persons.<sup>34</sup>

In so far as Soviet parties were involved, the FTAC applied Soviet law without further consideration of the classification of an arbitration agreement.<sup>35</sup> It was difficult to determine whether the FTAC applied Soviet law to examine the validity of an arbitration agreement based on the contractual theory or the procedural theory.

If the contractual theory was followed, the basis might be the Soviet or Russian Civil Codes. They permitted the parties to choose law applicable to ordinary contracts concerning international transaction. In the absence of agreement, the law of the place where contracts on foreign trade were concluded was regarded as the law applicable to the contracts (Article 126 of the 1961 Principles of CL and Article 566 of the 1964 CC). In fact, most foreign trade contracts involving Soviet parties were concluded in the USSR, therefore Soviet law was applied as the law of the place where contracts were concluded, unless the parties agreed otherwise.

Although Soviet legislation did not make specific provisions, Soviet authority strongly favoured settling international disputes involving Soviet parties in the USSR by applying Soviet law. The reason for this seems to be based on the strong administrative nature of the Soviet legal system. Under the USSR regime, rules relating to contracts between individuals were relatively unimportant. Contract law was of greater significance for relations between socialist organisations. Since personal ownership was strictly limited in the USSR, most contracts concerned state property and were governed by the planning acts of the state. The content of contractual obligations relating to foreign trade followed this pattern.

Because individual trade with foreign countries was almost impossible under the Soviet regime, all the Soviet parties involved in arbitrations were state organisations, which were under an obligation to fulfil the administrative commands of the planning acts. Thus, contracts relating to foreign trade must be understood in the context of administrative commands rather than in the context of freedom of

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<sup>34</sup> Lunts, L. A. *Vneshnetorgovaya Kuplya-prodazha: Kollizionn'e Vopros'*. Moscow: Yuridicheskaya Literatura, 1972: pp. 80-81.

<sup>35</sup> Viechtbauer, Volker. "Arbitration in Russia." *Stanford Journal of International Law*. Vol. 29, 1992-1993: pp. 355 at 382-383.

contract among citizens or juridical persons in the Western sense. Since arbitration agreements relating to foreign trade must be also understood in the context of administrative command, Soviet authority preferred to resolve disputes arising from the administrative nature of foreign trade in its own territory by its own legislation.

If the procedural theory was followed, the law applicable to an arbitration agreement had to be Soviet law so long as arbitration was held in the USSR. The procedural theory regards an arbitration agreement as an agreement which creates an exceptional form of the jurisdiction of the state courts and consequently, the validity of the arbitration agreement must be examined by the state law, that is, Soviet law. Thus, whether the contractual theory or the procedural theory was followed, Soviet law was applied.

## II-B-2. Precedents in the FTAC, AC or ICAC and National Courts

A clear decision on the contractual-procedural controversy was made by the FTAC in 1974. In the case of *VO Traktoroeksport v. Tarapur*,<sup>36</sup> the FTAC stated that it decided all procedural issues according to Soviet law, independently of which law was applied as the proper law of the contract, because the question of the validity of an arbitration agreement was characterised pursuant to Soviet law as a procedural issue.<sup>37</sup>

In the case of *Sojuznefteexport v. Joc Oil*<sup>38</sup> in 1984, quoting the above decision, the FTAC stated that an arbitration agreement was a procedural contract, independent of the material-legal contract and that the question as to the validity or invalidity of this contract did not affect the arbitration agreement.<sup>39</sup>

Recently, in the case of No. 222/1991,<sup>40</sup> a Russian organisation brought a claim against a Belgian firm to recover the cost of goods supplied. The AC regarded the main contract as invalid since it violated Soviet legislation on the signing of foreign trade transactions. The AC stated that the arbitration clause or agreement was a procedural contract independent of the main substantive contract which incorporated an arbitration clause, and that the rules for the signing of foreign trade transactions were not applicable to arbitration agreements. The AC decided that the

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<sup>36</sup> Lebedev, Sergei N. Mezhdunarodni Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon. Moscow: Torgovo-prom'shlennaya Palata SSSR, 1988: p. 73.

<sup>37</sup> Hobér, Kaj. "Arbitration in Moscow." Arbitration International. Vol. 3, No. 2, 1987: p. 119 at 133.

<sup>38</sup> *Sojuznefteexport v. Joc Oil* Yearbook: Commercial Arbitration. Vol. 18, 1993: p. 92.

<sup>39</sup> *Id.*, at 99.

<sup>40</sup> Kabatov, V. "Iz praktiki Mezhdunarodnogo kommercheskogo arbitrazhnogo suda pri TPP RF." Vneshnyaya Torgovlya. Vol. 2-3, 1994: pp. 28 at 28-29.

main contract was invalid but that it had competence to hear the dispute, based on a valid arbitration agreement.

The Russian courts also follow the procedural theory. In *IMP Group (Cyprus) Ltd. v. Aeroimp*,<sup>41</sup> the Russian joint venture, Aeroimp, concluded a hotel administration agreement with the Canadian company, IMP Group (Canada), on 16th October 1993. IMP Group (Canada) assigned the agreement to IMP Group (Cyprus) on 31st January 1993. When disputes arose from the agreement, IMP Group (Cyprus) referred them to the International Court of Arbitration of the International Chamber of Commerce. The award was made on 24th January 1997. IMP Group (Cyprus) sought to enforce the award in Russia. The Moscow City Court refused enforcement on the grounds that the arbitration agreement had not been validly assigned.

It is unclear law of which country was applied to examine the validity of the arbitration agreement in this case. It seems that the Moscow City Court drew general principle of an arbitration agreement, by stating: "Basing on the principle of autonomy of the arbitration clause, according to which an arbitration clause that forms a part of a contract shall be considered as a procedural agreement independent from other terms of contract." This decision of the Moscow City Court was confirmed by the Supreme Court of the RF on 3rd June 1997.

## II-B-3. Basic Conflict of Laws Rules under the Procedural Theory

If the procedural theory is followed, the law applicable to an arbitration agreement must be Russian law in so far as arbitration is held in Russia. As decided in the case of *VO Traktoroeksport v. Tarapur*, the question of the validity of the arbitration agreement must be examined by Soviet law as a matter of procedure, independent from substantive law. As discussed above, according to the procedural theory, it excludes application of rules of conflict of laws which might suggest application of foreign law. Professor Lebedev admitted that:

"An analysis of Soviet arbitration practices as a whole suggests that the problem of the validity of submission to an institutional arbitration court should be resolved by reference to Soviet law, as the "law of the arbitration court" selected by the parties, regardless of which law is applicable to the contract *per se*."<sup>42</sup>

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<sup>41</sup> "*IMP Group (Cyprus) Ltd. v. Aeroimp*" Yearbook of Commercial Arbitration. Vol. 23, 1998: p. 745.

<sup>42</sup> Lebedev, Sergei N. "International Commercial Arbitration in the Socialist Countries Members of the

Professor Lebedev stated that the reason for this was based on not the procedural theory but a special conflict of rule,<sup>43</sup> which will be explained in the following section.

In Russia, the procedural law most likely applicable to an arbitration agreement is the Civil Procedure Code of the RSFSR adopted on 11th June 1964<sup>44</sup> (hereafter referred to as the 1964 CPC). However, historically, neither were norms of the Law on Court of the USSR and the RSFSR nor Civil Procedure Codes of the USSR and the RSFSR applied in arbitral proceedings in the FTAC.<sup>45</sup> The reason for this was that there was a view that an arbitration agreement theoretically rules out the jurisdiction of courts, and consequently exclude application of the 1964 CPC.<sup>46</sup> Thus, although arbitration is regarded as having procedural characteristics in Russia, arbitration is understood as the exceptional form of dispute settlement different and independent from the civil procedure code.

Recently, however, an exception has been added to the 1993 Law on the ICA, which was the introduction of the UNCITRAL Model Law in Russia. The following rules can be inferred from Article 34-2 of the 1993 Law on the ICA: the parties can choose the law governing the arbitration agreement, if they do not do so, the law of the RF will be applied. Thus, the parties' autonomy is recognised as regards the law applicable to an arbitration agreement. The procedural theory with this qualification may permit that the parties to choose the law governing the arbitration agreement. However, in the absence of such an agreement, following the procedural effect, Russian law will apply.

## II-B-4. Sui Generis Contract

### II-B-4-a. Special Conflict of Laws Rules

Professor Lebedev explained why the FTAC was inclined to apply Soviet law as the law applicable to an arbitration agreement:

"The reason for this approach is sometimes said to lie in the procedural characterisation of arbitration, although we believe it would be more correct to regard it in the sense of a special conflict rule applicable to the said

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CMEA." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 158, V, 1977: p.97 at 131.

<sup>43</sup> Id., at pp. 131-132.

<sup>44</sup> Vedomosti Verkhovnogo Soveta SSSR. No. 24, 1964: Item 416.

<sup>45</sup> Pozdnyakov, V. "Arbitrazhn'i sud pri TPP SSSR." Vneshnyaya Torgovlya. Vol. 4, 1989: p. 55.

<sup>46</sup> Lebedev, Sergei N. "International Commercial Arbitration in the Socialist Countries Members of the CMEA." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 158, V, 1977: p.97 at 134.



arbitration and finding support, *inter alia*, in Article V-1-a of the 1958 New York Convention wherefrom a general conclusion may be drawn that, apart from the problem of legal capacity of a party, the validity of their agreement to submit to arbitration where they have not subjected it to a particular law is to be governed by the law of the country where the award is to be rendered."<sup>47</sup>

Lebedev explained that the law applicable to an arbitration agreement could be inferred from the provisions of the 1958 New York Convention, irrespective of cases on enforcement of foreign arbitral award or staying litigation on the ground of the existence of an arbitration agreement.

This view has been further confirmed recently, because Article 1-5 of the 1993 Law on the ICA provides that if the Russian Federation has established rules by international agreement other than those contained in Russian legislation on arbitration, the rules contained in the international agreement apply. Therefore, international treaties on arbitration may be applied to the question of the law applicable to an arbitration agreement in member countries. One of characteristics of the Soviet or Russian legal system is that international treaties or conventions are directly incorporated into the domestic legal system. For example, Article 1-5 of the 1993 Law on the ICA provides that if the Russian Federation has established rules by international agreement other than those contained in the Russian Legislation on arbitration, the rules contained in the international agreement apply.

Article V-1-(a) provides that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. From this provision, the law applicable to an arbitration agreement is the law which the parties agreed, failing such an indication, the law of the country where the award was or is to be made. These rules are in the interest of enforceability.

Similarly, in all the arbitration proceedings in member countries of the 1961 European Convention, Article VI-2 can be applied. It provides that, in taking a decision concerning the existence or the validity of an arbitration agreement, the

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<sup>47</sup> Lebedev, Sergei N. "International Commercial Arbitration in the Socialist Countries Members of the CMEA." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 158, V, 1977: p.97 at 131-132.

courts of a contracting state shall examine the validity of such an agreement in terms of the law to which the parties have subjected their arbitration agreement, failing any indication thereon, under the law of the country where the award is to be made, and failing any indication thereon, under the competent law by virtue of the rules of conflict of laws of the court seized of the dispute.

If these provisions can be considered to determine the Russian rules on conflict of laws drawn from the international conventions, in the sense of a special conflict rule as Lebedev explained, theoretically, the provisions of the recent 1993 Law on the ICA can also be the source of rules on conflict of laws, because it copied the UNCITRAL Model law. Much rests on the understanding of Russian courts. If they can be so considered, the provisions of the 1993 Law on the ICA can be applied to all cases, irrespective of whether a party is from a member country of the 1958 New York Convention or 1961 European Convention, because the 1993 law on the ICA is the general law concerning international arbitration in Russia.

Traditionally, only actual intentions clearly expressed by the parties as to the law governing the arbitration agreement have been considered to determine the chosen law in Russia.<sup>48</sup> Implied intentions are therefore unlikely to be considered. The future attitude of the court will depend on the practice of the ICAC, assuming that the Moscow City Court or the Supreme Court of the RF accords it recognition.

## II-B-4-b. Classification under International Private Law Itself

It seems that Lebedev's interpretation denies the contractual-procedural classification of an arbitration agreement. An arbitration agreement is classified as *sui generis* contract in the international dimension,<sup>49</sup> and conflict of laws rules inferred from the international conventions are applied, especially that of the 1958 New York Convention.

The classification of an arbitration agreement is basically self-contained, and does not fully explain the special function of an arbitration agreement. For the determination of the law applicable to an arbitration agreement, the classification of an arbitration agreement is however necessary. One possibility for harmonisation is that an arbitration agreement should be understood not under domestic law but in an international context. As regards international private law, the classification of an arbitration agreement for the determination of the law applicable to it should be

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<sup>48</sup> Lunts, Lasar. A. "Conflict of Laws in International Sale: Theory and Practice of Socialist Countries." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 114, I, 1965: p. 1 at 29.

<sup>49</sup> Lebedev, Sergei N. Mezhdunarodn'i Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon. Moscow: Torgovo-promishlennaya Palata SSSR, 1988: p. 85.

based not on domestic law but on the general principles in the international context.

Thus, the *sui generis* classification of an arbitration agreement for determination of the law applicable to it is similar to that of Professor Ernst Rabel's. Rabel stated that classification for determination of conflicts of laws rules must be based on international private law itself through comparative research, independent of foreign as well as domestic substantive law.<sup>50</sup> Lebedev classified an arbitration agreement based on concept inferred from international treaties, whose rules were established through comparative study.

It may be sufficient to examine whether or not an agreement satisfies the general principles of an arbitration agreement under the 1958 New York Convention, which parallel the general principles drawn from general comparative study for the unification of law. The minimum general principle may be an agreement of the parties to refer disputes to a third party and to be bound by that decision. Then, the special conflict of laws rules inferred from the 1958 New York Convention can be applied.

If the general principles of an arbitration agreement under the 1958 New York Convention are not satisfied, resort should be made to the ordinary way of classification for determination of the law applicable to it in a country. They may be based on, for example, the concept in the forum, the concept under the law applicable to it, or the concept of general principles developed from comparative study.

Rules on an arbitration agreement under a domestic law can be internationalised so as to be in harmony with the general principles of an arbitration agreement in international context which are applied for the classification under international private law in that country. There will thus be no difference between classification under domestic law and international private law in that country based on general principles in the international context.

In this way, classification based on the general principles of an arbitration agreement in the international context in international private law and the application of special conflict of laws rules inferred from the 1958 New York Convention can bring harmonisation.

## II-C. Application of Foreign Law

In Russia, the method of applying foreign law has traditionally been for the

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<sup>50</sup> Rabel, Ernst. The Conflict of Laws: A Comparative Study. Ann Arbor, USA: University of Michigan Law School, 1958: p. 55.

court to investigate the true contents of such norms in the practice of the foreign country.<sup>51</sup> Judges seek the content of a foreign law or custom by gathering evidence themselves or by appointing experts.<sup>52</sup> This is akin to the civil law approach which applies foreign law as law, unlike the common law approach which regards foreign law as fact.

In terms of foreign law, Russia seems to have a similar problem with Japan. Since the FTAC, AC and ICAC had, in practice, exclusive jurisdiction, most judges in courts and arbitrazh courts are not familiar with cases relating to international trade. The judge's ability to study and understand various foreign laws may thus be limited. If the foreign law cannot be properly understood, the court may presume it to be the same as the law of the forum.<sup>53</sup>

As suggested in previous chapters, it is desirable that courts should refer cases to arbitration on the basis of *prima facie* written evidence of an arbitration agreement which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* competent parties. Then, judges need not fully study relationships between the invalidity of the main contract and the validity of the arbitration agreement at least when there is formal evidence for an arbitration agreement.

## III. Under Law on Arbitration

### III-A. Principle of Separability

### II-A. Before the 1932 State on the FTAC

#### III-A-1. Issue on Arbitration for Future Dispute

In the USSR, there had been no clear legislative provision of the principle of separability until the 1993 Law on the ICA was enacted. Its Article 16-1 follows the principle of separability. Although Section 3 of the 1988 Rules on the AC provided that an arbitration clause should be deemed as having legal force irrespective of the validity of the contract of which it was an integral part, the 1988 Rules on the AC were, strictly speaking, not general law on arbitration but the only procedural rules of the Arbitration Court.

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<sup>51</sup> Lunts, L. A. "Conflict of Laws in International Sale: Theory and Practice of Socialist Countries." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 114, I, 1965: p. 1 at 15.

<sup>52</sup> Pisar, Samuel. "Soviet Conflict of Laws in International Commercial Transactions." Harvard Law Review. Vol. 70, No. 4, 1957: p. 593 at 615.

<sup>53</sup> Pisar, Samuel. "Soviet Conflict of Laws in International Commercial Transactions." Harvard Law Review. Vol. 70, No. 4, 1957: p. 593 at 615.

Traditionally, Russian law recognised only the submission of disputes which had already arisen based on the submission of the parties. Under this tradition, the parties submitted disputes to arbitration after confirming the existence and elements of the disputes. Therefore, the principle of the separability of an arbitration agreement hardly came into question.

In the period of the Russian Empire, Article 1367 of the Civil Procedure Code of 20th November 1864 (hereinafter referred to as the 1864 CPC) provided that all persons having the right to dispose freely of property could refer existing disputes to one or to an odd number of mediators (*носредник*) by mutual agreement. Article 1368 also provided that disputes being subject to judicial organs could be referred to the *treteiskii* court.<sup>54</sup>

In the early period of the Soviet regime, Article 2 of the 1924 Statute on the *Treteiskii* Court<sup>55</sup> provided that an agreement to submit to arbitration all disputes which may arise in the future should not deprive parties of the right to apply to the proper court under the general rules of the 1923 CPC.<sup>56</sup>

Thus, traditionally, the *treteiskii* court could hear only disputes which had already arisen. This system was contrary to the 1925 Economic Treaty between the Soviet Union and Germany, and international practice which recognised agreements to arbitrate future disputes.

Rashba stated that agreements to arbitrate future disputes found in the treaties were not consonant with the Russian legal system and did not rest on a firm basis.<sup>57</sup> Samuel Pissar stated that the 1923 CPC and 1924 Statute on the *Treteiskii* Court could be applied to international commercial disputes,<sup>58</sup> although Pissar did not mention specific examples. The evidence suggests that the Russian Supreme Court

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<sup>54</sup> See, e.g., Saatchian, A. P. *Ustav' Grazhdanskago Sudoproizvodstva*. St. Petersburg: Izdanie Yuridicheskago Knizhnago Magazina, 1911: pp. 222-3.

<sup>55</sup> The Civil Procedure Code was approved on 7th July 1923 (herein after referred to as the 1923 CPC) (see, e.g., Ioffe, O. C. ed. *Solok let Sovetskogo Prava 1917-1957 Tom I*. Leningrad: Isdatel'stvo Leningradskogo Universiteta, 1957: p. 653). It came into force on 1st September 1923. Article 199 provided that an agreement of the parties to settle a dispute in the *treteiskii* court had to be certified by a notary. Article 201 provided that a record of the decisions of the *treteiskii* court would be kept by the people's court (see, e.g., Uckov, V. P. ed. *Grazhdanskii Protssessual'nyi Kodeks RSFSR s Izmeneniyami do 1 Maya 1935 goda*. Moscow: Gosudarstvennoe Izdatel'stvo Sovetskoe Zakonodatel'stvo, 1935: pp. 40-41).

The new Civil Code was also enacted previous year. It was the first civil code in the 20th century (Inako, Tsuneo. "Roshia-renpô-minpô-ten (dai-ichi-bu)." *Shakai-shugi-hô no ugoki*. Vol. 80, 1995: p. 15).

<sup>56</sup> Gsovski, Vladimir. *Soviet Civil Law Vol. 2*. Michigan: University of Michigan Law School, 1949: pp. 663-667.

<sup>57</sup> Rashba, Evsey. "Settlement of Disputes in Commercial Dealings with the Soviet Union." *Columbia Law Review*. Vol. 45, 1945: p. 530 at 538.

<sup>58</sup> Pissar, Samuel. "The Communist System of Foreign-Trade Adjudication." *Harvard Law Review*. Vol. 72, No. 8, 1959: p. 1409 at 1459.

regarded it as an exceptional form under the 1923 CPC.<sup>59</sup> And probably, therefore, in harmony with the 1923 CPC, the term “treteiskii” (treteiskii settlement, *третейское разбирательство*) was used in the treaty. Later, when the system of international commercial arbitration became clearly independent of the 1923 CPC, other terms such as “arbitration court” (*международный коммерческий арбитраж*) were used.

### III-A-2. Arbitration Agreement in Concession Agreement

Under the tradition of submission of disputes which had already arisen, the principle of the separability of an arbitration agreement hardly came into question. However, in cases of arbitration under international treaties where agreements to arbitrate future disputes could be concluded, the principle of separability could be argued. In the early USSR regime, there was one important international case dealt with the principle of separability of an arbitration agreement.

In the case of *Lena Goldfields, Ltd. v. the Soviet government*,<sup>60</sup> Lena Goldfields Ltd. London (Lena) recalled its engineers from the Soviet Union and withdrew the power of attorney from its representatives. The class struggle was led in argument as a means of discrediting the employees of Lena.<sup>61</sup> In February 1930, Lena commenced arbitration referring the issue on the impossibility of performing its own part of the concession agreement, and the Soviet government appointed arbitrators and made a defence that the Lena failed to pay royalties and committed other breaches of the concession agreement. On 29th April 1930, Lena dissolved the concession agreement by stating that it took no further responsibilities under it. On 5th May 1930, the Soviet government withdrew from the arbitration on the ground that the scope of the arbitration reference was changed from the breaches of the concession agreement to dissolution of it.<sup>62</sup>

It has been mistakenly suggested that the Soviet government did not recognise the principle of separability of the arbitration agreement on the grounds that the arbitration agreement had to be terminated when the original contract was terminated by Lena. In fact, the issue was simply the scope of the arbitration

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<sup>59</sup> See, e.g., Uckov, V. P. ed. *Sbornik Raz'yasnenii Verkhovnogo Suda RSFSR*, 4th ed. Moscow: Gosudarstvennoe Izdatel'stvo Sovetskoe Zakonodatel'stvo, 1935: p. 148.

<sup>60</sup> See, Veeder, V. V. "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas." *International and Comparative Law Quarterly*. Vol. 47, Part 4, 1998: p. 747; see, also, Nussbaum, Arthur. "The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government." *Cornell Law Quarterly*. Vol. 36, 1950: pp. 31 at 31-41.

<sup>61</sup> Four employees of Lena were sentenced guilty for spies and saboteurs (id., Veeder, at 775-6).

<sup>62</sup> Id., at 778-9.

reference. This misunderstanding has some basis, because the Soviet government withdrew from the arbitration, and, in compliance with it, the Soviet-appointed arbitrator also resigned.

Whether or not the above issue concerned the separability of an arbitration agreement, direct reference could not be made to the 1924 Statute on the Treteiskii Court and the 1923 CPC, because arbitration agreements in concession agreements were subject to a special system independent from the 1923 CPC. Under Soviet law, both the arbitration clause and the concession agreement had a legal status equivalent to a decree of the USSR Council of People's Commissars, distinct from a simple civil law or civil procedural law contract."<sup>63</sup> This understanding, however, does not show peculiarity of Soviet legal system. There is a theory which categorises state contracts as quasi-international agreements. Under this theory, a state contract must be understood in its own legal order.<sup>64</sup>

For example, in the Concession Agreement between the USSR and Japan on Mining in Sakhalin in 1925,<sup>65</sup> Article 1 provided that the Soviet government would grant the right of concession in Sakhalin as an exception to the general law within the sphere of this agreement. Article 35 provided that this provision did not exclude the right to agree to refer disputes to arbitration in the case of dispute between the concessionaire and Soviet organisations or individuals.<sup>66</sup>

## III-B. After the 1932 Statute on the FTAC

### III-B-1. Establishment of the Principle of Separability

In France, the Civil Procedure Code of 1806 followed the same pattern as that which engaged in the USSR, that is, it recognised only agreements to arbitrate disputes which had already arisen (*compromis*) and did not recognise agreements to arbitrate future disputes (*clause compromissoire*). Around 1845, the Court of Cassation decided that such arbitration agreements were invalid. However, it soon later regarded them as valid if they were valid under the law governing the

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<sup>63</sup> Id., at 759-61.

<sup>64</sup> See, e.g., Chukwumerije, Okezie. Choice of Law in International Commercial Arbitration. London: Quorum Books, 1994: p. 148.

<sup>65</sup> Japan recognised the Soviet Union, and evacuated the Russian part of the island of Sakhalin. Instead, Japan obtained oil, coal and timber concession there.

<sup>66</sup> "Kita-Karafuto-Kôgyô-Riken." Nichiro-Nenkan 1938. Tokyo: Nichiro-tsûshin-sha, 1938: Sobieto-renpô no bu pp. 794-802.

Recently, a new concession project in Sakhalin is being discussed (see, Hokutô-Ajia-Saharin-kenkyû-kai ed. Saharin-sekiyu-gasu-kaihatsu-projekuto to Hokkaido-keizai no kassei-ka, Vol. 1. Otaru, Japan: Hokutô-Ajia-Saharin-kenkyû-kai, 1998).

contract.<sup>67</sup> Thus, the validity of agreements to arbitrate future disputes was first recognised in an international context.<sup>68</sup>

In France, an agreement to arbitrate future disputes was recognised under the Civil Procedure Code by the Act of 31st December 1925. On the other hand, in the USSR, this was eventually recognised as a special category independent of the Civil Procedure Code. The FTAC was established in order to deal with such special agreements and to exercise exclusive jurisdiction over disputes relating to Soviet foreign trade.

Broadly speaking, the FTAC was regarded as part of the *treteiskii* court.<sup>69</sup> However, in a narrow sense, the FTAC was separated from *treteiskii* court under the 1924 Statute on the *Treteiskii* Court and the 1923 CPC. Accordingly, the FTAC was given parallel status to the national courts in terms of Article 23 of the 1923 CPC.<sup>70</sup> It provided that disputes concerning foreign trade, especially disputes between foreign firms and Soviet trade organisations, should be examined by arbitration in the FTAC attached to USSR CCI and bound by its rules.<sup>71</sup>

The 1949 Rules on the FTAC were the first to recognise an agreement to arbitrate future disputes in a written form in the USSR.<sup>72</sup> In the FTAC, the principle of the separability of an arbitration agreement has long been practised after the 1930's. In *V/O Vostokintorg v. Mr. Bairam Erenchuch (Turkey)*<sup>73</sup> in 1941, Vostokintorg concluded a contract to sell cotton fabrics with Mr. Erenchuch. Erenchuch failed to fulfil his contractual obligation to deposit fund with a bank in Istanbul, and the contract was deemed thus to be repudiated. The FTAC recognised that the contract including the arbitration clause had been repudiated. However it heard the case. Although the FTAC did not refer specifically to the principle of the separability of an arbitration agreement, in effect, it recognised such a principle.

<sup>67</sup> Herzog, Peter. *Civil Procedure in France*. Hague, The Netherlands: Martinus Nijhoff, 1967: p. 513.

<sup>68</sup> Domke, Martin. "Arbitral Clauses and Awards: Recent Developments in French Law." *Tulane Law Review*. Vol. 17, 1943: p. 447 at 448.

<sup>69</sup> See, e.g., "Treteiskii Sud." *Bol'shaya Sovetskaya Entsiklopediya* Tom 54. Moscow: Gosudarstvennyi Nauchnyi Institut, 1946: p. 766 at 767; see, also, Abramova, S. N. *Grazhdanskii Protsess*. Moscow: Yuridicheskoe Izdatel'stvo, 1948: p. 156.

<sup>70</sup> *Sobranie Zakonov i Rasporiazhenii SSSR*. No. 5, 1934: Item 31; No. 14, 1936: Item 94.

<sup>71</sup> The FTAC and *treteiskii* court has also been treated independently under the 1964 CPC. Article 27 provides that in the case laid down by law or international treaty, a dispute arising from a civil law relationship may, on the agreement of the parties, be transferred for a decision to a chosen arbitration court (*treteiskii* court), the Maritime Arbitration Commission, or the FTAC.

<sup>72</sup> It is unclear whether or not, the 1932 Statute of the FTAC recognised this principle from the provisions.

<sup>73</sup> *V/O Vostokintorg v. Mr. Bairam Erenchuch (Turkey)*. Butler, William E. ed. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission." *International Commercial Arbitration: Soviet Commercial and Maritime Arbitration*. New York: Oceana Publications, Inc., 1980: Case No. 21.



Recently, Article 16-1 of the 1993 law on the ICA, which is a copy of the UNCITRAL Model Law, provides that an arbitration provision which is part of a contract must be treated as an agreement independent of the other conditions of the document.

Section 1-5 of the 1994 Rules on the ICAC provides that the question of the ICAC jurisdiction in a given case shall be decided by the arbitral tribunal considering the case. For that purpose the arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the ICAC that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

### III-B-3. Explanation based on the Procedural Theory

The reason for the establishment of the principle of separability of an arbitration agreement was clearly described in *Sojuznefteexport v. JOC Oil*<sup>74</sup> in 1984. The FTAC stated that an arbitration agreement was a procedural contract, independent from the material-legal contract and that the question as to the validity or invalidity of this contract did not affect the arbitration agreement.<sup>75</sup> In this case, adopting the procedural theory, the FTAC stated that an arbitration agreement can be recognised as invalid only in the case where there were defects in will (mistake, fraud and so on), or breach of the requirements of the law relating to the content and the form of an arbitration.<sup>76</sup>

Similarly, in the case of No. 222/1991,<sup>77</sup> the AC stated that the arbitration clause or agreement was a procedural contract independent from the main substantive contract which incorporated an arbitration clause. Thus, in the USSR, the FTAC and AC obviously followed the explanation based on the separate classification of the main contract and arbitration agreement under the procedural theory, as regards the principle of separability of an arbitration agreement.

Recently, the Russian courts also follow the procedural theory. In *IMP Group (Cyprus) Ltd. v. Aeroimp*,<sup>78</sup> it seems that the Moscow City Court drew on the general principle of an arbitration agreement, by invoking: "Basing on the principle of autonomy of the arbitration clause, according to which an arbitration clause that

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<sup>74</sup> *Sojuznefteexport v. JOC Oil* Yearbook: Commercial Arbitration. Vol. 18, 1993: p. 92.

<sup>75</sup> *Id.*, at 99.

<sup>76</sup> *Id.*, at 98.

<sup>77</sup> Kabatov, V. "Iz praktiki Mezhdunarodnogo kommercheskogo arbitrazhnogo suda pri TPP RF." Vneshnyaya Torgovlya. Vol. 2-3, 1994: p. 28 at 28-29.

<sup>78</sup> "*IMP Group (Cyprus) Ltd. v. Aeroimp*" Yearbook of Commercial Arbitration. Vol. 23, 1998: p. 745.

forms a part of a contract shall be considered as a procedural agreement independent from other terms of contract.”<sup>79</sup> This decision of the Moscow City Court was confirmed by the Supreme Court of the RF on 3rd June 1997.

The Supreme Court seems once more to imply to accept the procedural theory of an arbitration agreement in *Izmeritel' v. Omegatekh Elektroniks GmBKh*.<sup>80</sup> The arbitral tribunal in the ICAC ruled on 21st July 1996 that the Russian state factory, Izmeritel,' should pay to the company, Omegatekh Elektroniks GmBKh, 2,197,119.53 US dollars plus annum interest from 31st October until payment. Izmeritel' appealed to the Moscow City Court on the grounds that the contract was not concluded, and consequently that an arbitration agreement was not made. The respondent could not show the original contract, and submitted only a copy of it. Since the arbitral tribunal accepted the copy of the contract as evidence, the Moscow City Court decided that the award was against public policy because it was contrary to the Russian legislation. On 25th September 1998, the Supreme Court of the RF reversed the decision, and stated that its outcome, not the nature of the evidence must be considered in order to decide whether or not issues were contrary to public policy.

In this case, the Supreme Court stated that the issues under Article 34-2-1 of the 1993 Law on the ICA including the party's proof of invalidity of the arbitration agreement were of a procedural nature. They are to be distinguished from substantive law (*материальное право*) basis governed by Article 34-2-2, such as the court's determination of whether or not the subject of the dispute may be subject of the arbitral proceedings in Russian law, or whether or not the arbitral decision is contrary to public policy.<sup>81</sup>

In Russian legal theory, "substantive law" refers to legal right with the help of which the state achieves an effect on social relations by way of direct and immediate legal regulation.<sup>82</sup> Although the above decision did not directly invoke the procedural theory, it distinguished procedural issues relating to the arbitration agreement and substantive issues relating to contents in the award. Thus, the Supreme Court leans towards the procedural theory as to the principle of separability of an arbitration agreement.

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<sup>79</sup> Id., at 748.

<sup>80</sup> "*Izmeritel' v. Omegatekh Elektroniks GmBKh*" *Byulleten' Verkhovnogo Suda Rossiiskoi Federatsii*. Vol. 3, 1999: p. 12.

<sup>81</sup> Generally speaking, under civil law, public policy includes issues of procedural justice, on the other hand, under the common law, it excludes them (Holtzmann, Howard M. and Neuhaus, Joseph E. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*. Boston: Kluwer Law and Taxation Publishers, 1989: p. 914).

<sup>82</sup> Yurinformtsentr ed. *Yuridicheskaya Entsiklopediya*. Moscow: Yurinformtsentr, 1995: p.150.

It seems that procedural classification of an arbitration agreement implies nothing more than a simple means of differentiation between the main substantive contract and the agreement to arbitrate. However, this simple means of differentiation can bring clear logical reasoning to the principle of separability, the assignment of rights and obligations relating to arbitration agreements, and the principle of Kompetenz-Kompetenz, which will be discussed below.

In spite of this clear logical structure in a wide sphere of matters relating to arbitration based on the procedural theory, there has been criticism of this kind of approach, and this focuses on the nature of an arbitration agreement in Russia.

### III-B-4. Another Approach to Interpretation of the Principle of Separability of an Arbitration Agreement

#### III-B-4-a. Positive Legal Norm Theory

Lebedev takes another approach, which focuses not upon the nature of an arbitration agreement but upon the context. This approach denies the self-contained nature of an arbitration agreement, and instead focuses upon the effect of an arbitration agreement in practical context. It is the positive legal norm theory (*Теория позитивного правового норма*).

According to this theory, it is recognised in law that an arbitration agreement can have legal force independent from the main substantive contract.<sup>83</sup> Therefore, a party can positively invoke this when the invalidity of the main substantive contract threatens to undermine the arbitration agreement.

Under the procedural theory, since classification of an arbitration agreement as a procedural contract is different from that of the main contract as a substantive contract, the separability and independence of an arbitration agreement is guaranteed by law. Unlike the procedural theory, the positive legal norm theory simply grants the arbitration agreement the effect of separability and independence of the main substantive contract, which is the internationally recognised principle.<sup>84</sup>

Section 1-3 of the 1988 Rules on the AC clearly provided that an arbitration clause should be deemed as having legal force irrespective of the validity of the contract of which it was an integral part. This provision was added to Section 1 of the Rules of Procedure for cases in the FTAC approved by the Supreme Soviet of the USSR on 16th April 1975.<sup>85</sup>

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<sup>83</sup> Lebedev, Sergei N. Mezhdunarodn'i Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Soglashenie Storon. Moscow: Torgovo-prom'shlennaya Palata SSSR, 1988: p. 82.

<sup>84</sup> Id., at 88.

<sup>85</sup> Vedomosti Verkhovnogo Soveta SSSR. No. 29, 1975: Item 438.

Article 16-1 of the 1993 law on the ICA also provides that an arbitration provision which is part of a contract must be treated as an agreement independent of the other conditions of the document.

Indeed, recently, there are few cases in the ICAC where arbitral tribunal classified an arbitration agreement as a procedural contract. Most cases simply recognised the validity of arbitration agreements, irrespective of the validity of the main contract, on the basis of Article 16-1 of the 1993 Law on the ICA rather than classifying it as a procedural contract. For example, in case No. 451/1991,<sup>86</sup> the main contract was regarded as void because it was not signed by two authorised persons. However, the arbitration clause was regarded as valid on the basis of Article 16-1 of the 1993 Law on the ICA. Similarly, in case No. 400/1993,<sup>87</sup> the arbitral tribunal in the ICAC recognised the validity of an arbitration clause on the basis of Article 16-1, although the respondent disputed validity of the main contract on the grounds that the person who had concluded the contract had no authority. These decisions seem to be inclined to the positive legal norm theory.

### III-B-4-b. Effects of the Positive Legal Norm Theory

As mentioned above, the positive legal norm theory denies the classification of an arbitration agreement and consequently its self-contained nature. It simply recognises the separability of an arbitration agreement as the internationally recognised principle.<sup>88</sup> In this sense, the positive legal norm theory may incline to the delocalisation theory.

There are some factors which show a tendency toward the delocalisation theory in Russia. For example, there has been a theory that the provisions of the 1958 New York Convention may be applied, irrespective of proceedings on recognition and enforcement of awards in order to determine the law applicable to an arbitration agreement. Furthermore, it should be remembered that the USSR was probably one of the most advanced countries in the world with regard to delocalisation, although its practice was limited to the socialist countries.

For example, the USSR signed the Convention for Solving by Arbitration of Civil Law Disputes arising from Relations of Economic, Scientific and Technological Co-operation in Moscow on 26th May 1972 (the 1972 Moscow Convention). The 1972 Moscow Convention prescribed arbitration as the only means

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<sup>86</sup> Rozenverg, M. G. Praktika Mezhdunarodnogo Kommercheskogo Arbitrazhnogo Suda. Moscow: Mezhdunarodnyi tsentr finansovo-ekonomicheskogo razvitiya, 1997: p. 17 (Case 7).

<sup>87</sup> Id., at 99 (Case 36).

<sup>88</sup> Lebedev, Sergei N. Mezhdunarodn'i Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon. Moscow: Torgovo-prom'shlennaya Parata SSSR, 1988: p 88.

of settling disputes arising from relations of economic, scientific and technological co-operation among the member countries.

There were also the unified rules on goods transaction among the Council for Mutual Economic Aid (hereinafter referred to as the CMEA) countries, that is, General Conditions for the Deliveries of Goods between Organisations of the CMEA member countries first established in 1951 and renewed in 1968 (hereafter referred to as the GCD). Lunts commented that "the GCD show a clear tendency towards the total unification of the rules of substantive law to avoid questions of conflict of laws in foreign trade transactions between socialist countries."<sup>89</sup>

Under both the procedural theory and positive legal norm theory, separability, independence or autonomy of an arbitration agreement can be established. Therefore, Russian experts on arbitration may use the word "autonomy (*автономность*)" in two different ways. It may be in the context of the sui generis theory which focuses upon the nature of an arbitration agreement, or in the context of the positive legal norm theory which focuses upon the significance of an arbitration agreement in practical context. The President of the ICAC, A. Komarov, explained as follows:

"Even if one of the parties disputes the competence of the arbitration for the reason that the main contract including the arbitration clause is invalid, the arbitration, none the less, remains valid because the arbitration clause should be examined, from the point of law, as another agreement independent from the other conditions of the main contract. In other words, an arbitration agreement should be assessed for this purpose as autonomous (*автономное*)."<sup>90</sup>

Thus, the principle of separability of an arbitration agreement is recognised under statute as a positive legal norm in England, Japan and Russia. The substantive or procedural classification of an arbitration agreement should not therefore exert too much influence over the other issues. An arbitration agreement and its effects over the principle of separability of an arbitration agreement should be understood in the classification as a sui generis contract in the specific regime of international commercial arbitration.

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<sup>89</sup> Lunts, L. A. "Conflict of Laws in International Sale: Theory and Practice of Socialist Countries." Recueil des Cours: Collected Courses of the Hague Academy of International Law. Vol. 114, I, 1965: p. 1 at 11.

<sup>90</sup> Komarov, A. "Mezhdunarodn'i kommercheskii arbitrazh v Rossii." Vneshnyaya Torgovlya. Vol. 4, 1995: pp. 17 at 18-19.

## III-B. Assignment of an Arbitration Agreement

Under the procedural theory, because of the separate nature of the main substantive contract from the arbitration agreement, the principle of separability is established. Similarly, because of their different natures, rights and obligations relating to arbitration are not automatically transferred with the assignment of the main substantive contract. An independent agreement is required.

In *Sojuznefteexport v. Joc Oil*,<sup>91</sup> Sojuznefteexport insisted that it assigned the claim for payment in respect of the goods to a third party, and consequently the rights and obligations relating to arbitration should also be assigned to the third party. According to commentaries on Article 213 of the Russian 1964 CC, the assignment of a claim had to be intimated by the creditor to the debtor authority. The assignee of the rights from Sojuznefteexport sent notice of the assignment to the debtor. However, the FTAC stated that an arbitration agreement could not be the subject of assignment at all, because it was an autonomous procedural contract. Thus, it required the independent agreement of the assignee because the parties had submitted to the jurisdiction which was chosen by the parties to the contract.<sup>92</sup>

The positive legal norm theory simply grants the arbitration agreement the effect of separability, independence or autonomy from the main substantive contract. Therefore, as under the procedural theory, it may be possible to formulate logical rules concerning the requirement of an independent agreement regarding the assignment of rights and obligations in an arbitration agreement.

## III-C. Kompetenz-Kompetenz

### III-C-1. Under the Soviet Regime

The principle of Kompetenz-Kompetenz had not been enacted in Russian statute until the 1993 Law on the ICA. As it concerned the rules of the permanent arbitral institution, it had not been enacted until the 1988 Rules on AC were established. Under the traditional procedural theory, an arbitration agreement is classified as procedural contract, which establish another quasi-state jurisdiction. Consequently, the FTAC had exclusive jurisdiction on international commercial

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<sup>91</sup> *Sojuznefteexport v. Joc Oil* Yearbook: Commercial Arbitration. Vol. 18, 1993: p. 92.

<sup>92</sup> Id., at 100; also see, *Mr. Hoffman (Zurich) v. V O Mashinoimport*. "Collected Arbitration Awards of the USSR Foreign Trade Arbitration Commission." International Commercial Arbitration: Soviet Commercial and Maritime Arbitration. New York: Oceana Publications, Inc., 1980: Case No. 44.

disputes and other state courts were not ready to deal with them. Then, the principle of Kompetenz-Kompetenz did not have any practical significance under the USSR regime.

Furthermore, under the procedural theory, an arbitration agreement is regarded as an agreement with procedural characteristics which refers to a special type of jurisdiction of the state courts. In a sense, the legal basis under the procedural theory may be agreement to Soviet jurisdiction. Without the provision for the principle of Kompetenz-Kompetenz, the FTAC had practically exclusive jurisdiction over disputes arising from foreign trade and at the same time fully enjoyed the principle of Kompetenz-Kompetenz. There are several examples in which the FTAC decided its own competence.

In the case of *Sojuznefteexport v. Joc Oil*,<sup>93</sup> the FTAC examined its jurisdiction. In that case, All-Union Foreign Trade Association 'Sojuznefteexport' concluded a contract to sell oil with Joc Oil in Bermuda on 17th November 1976. The contract included an arbitration clause providing for arbitration at the FTAC in Moscow. Because of late deliveries of shipments, Joc Oil ceased to pay for the shipments on 25th May 1977 and Sojuznefteexport suspended further shipment from June 1977. On 20th May 1980, Sojuznefteexport filed a claim with the FTAC and Joc Oil filed a counterclaim for damages for breach of contract.

Before the FTAC, Joc Oil objected to the jurisdiction of the FTAC on the ground that contract was invalid, having been signed only by one individual. The Decree of the Central Executive Committee and Council of People's Commissars of the USSR of 26th December 1935 required contracts for foreign trade to be signed by two persons authorised by the organisation. The FTAC concluded that the contract was invalid. However the arbitration agreement, which survived by the principle of the separability of an arbitration agreement based on the procedural theory, was valid and the FTAC had jurisdiction. Thus, the status of a procedural contract established the principle of separability of an arbitration agreement, and the FTAC determined its own jurisdiction.

In case No. 51/1985,<sup>94</sup> the FTAC rejected its jurisdiction. A Hungarian foreign trade organisation brought a claim for compensation for delay in supplying goods against a Bulgarian foreign trade organisation. The respondent insisted that the FTAC had no competence because the dispute should be settled in the Bulgarian Arbitration Court attached to the Bulgarian CCI according to Article 2-1 of the 1972

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<sup>93</sup> *Sojuznefteexport v. Joc Oil*. Yearbook Commercial Arbitration. Vol. 18, 1993: p. 92.

<sup>94</sup> Kabatov, V. "Iz praktiki vneshnetorgovoi arbitrazhnoi komissii." Vneshnyaya Torgovlya. Vol. 5, 1986: p. 46.

Moscow Convention.<sup>95</sup> The FTAC concluded that it had no competence to examine the dispute because there was no agreement between the parties to be subject to its jurisdiction.

Recently, in case No. 40/1990,<sup>96</sup> the AC also ruled on its own competence. A Soviet joint venture with the participation of capitalist and developing countries brought a claim against a Bulgarian company into the AC based on the arbitration agreement. The claim arose out of delay in supplying products. The Bulgarian company responded that the dispute should be resolved by the Arbitration Court in the respondent's country based on the 1972 Moscow Convention. The AC decided that when the 1972 Moscow Convention was signed, joint ventures with the participation of capitalist and developing countries were not expected, therefore the 1972 Moscow Convention did not cover this case, and the AC had jurisdiction.

### III-C-2. Legislative Provisions

There is a theoretical basis for the principle of Kompetenz-Kompetenz but for a simple practical reason. That is, if an objection to the competence of the FTAC by one of the parties makes it impossible that the FTAC should examine the dispute, it is heavily inconvenient. Therefore, the FTAC should be able to examine the dispute without that dispute being referred a priori to a national court.<sup>97</sup>

With this in mind, the Soviet delegates to the Working Group for the 1961 European Convention insisted upon the principle that arbitrators or institutional arbitral tribunals should decide the question of their jurisdiction. This principle has been incorporated in Article 5 which provides that an arbitral tribunal, whose competence is disputed by a party to arbitration, should not relinquish the determination of the dispute and has the power to decide upon its own jurisdiction, including the validity and existence of the arbitration agreement.

Section 1-4 of the 1988 Rules on the AC provides that the question of the competence of the Arbitration Court regarding a specific case shall be decided by the

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<sup>95</sup> Article 2-1 of the 1972 Moscow Convention provides that all disputes among parties of the member countries shall be subject to arbitration by the Court of Arbitration attached to the CCI in the country of the respondent.

<sup>96</sup> Zysin, I. "Iz praktiki Mezhdynarodnogo kommercheckogo arbitrazhnogo suda pri TPP RF." Vneshnyaya Torgovlya. Vol. 2-3, 1995: p. 39.; Kabatov, V. "Iz praktiki Arbitrazhnogo suda pri TPP v Moskve." Vneshnyaya Torgovlya. Vol. 9, 1992: p. 37.

<sup>97</sup> The same basis was later discussed in the Working Group for the UNCITRAL Model Law, which stated that, without the principle of Kompetenz-Kompetenz, a party can interrupt the arbitration at any time merely by raising a jurisdictional objection which may bring court interruption. (Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1989: p. 479).



arbitral tribunal considering the case.

Article 16-1 of the 1993 Law on the ICA provides that the arbitral court can itself issue a decision on its own competence, including on any answer concerning the presence or the validity of the arbitration agreement. For this purpose, an arbitration provision which is part of a contract must be treated as an agreement independent of the other conditions of the document. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. This is based on the practical reason that, without the principle of Kompetenz-Kompetenz, a party can interrupt the arbitration at any time merely by raising a jurisdictional objection.<sup>98</sup>

Thus, in Russia or under the UNCITRAL Model Law, in order to maintain the principle of Kompetenz-Kompetenz, the principle of separability is established, in which an arbitration agreement or clause, even if it is part of a contract, is treated as an independent agreement separated from the contract.<sup>99</sup> This approach is significantly different from that in England and Japan.

In England, in theory, the principle of separability of an arbitration agreement has no direct relationship with the principle of Kompetenz-Kompetenz. In so far as arbitral proceedings are continued on the basis of the principle of separability without challenge to the jurisdiction, the arbitral tribunal can continue its proceedings under the assumption that it has competence to do so. On the other hand, Kompetenz-Kompetenz deals with challenges to the jurisdiction of the arbitral tribunal.<sup>100</sup>

Similarly, in Japan, there is no clear logic as to the relationship between the principle of separability of an arbitration agreement and the principle of Kompetenz-Kompetenz.

In Russia, however, Article 16-1 of the 1993 Law on the ICA clearly provides that the arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the principle of separability of an arbitration agreement is established. Thus, the principle of Kompetenz-Kompetenz and the separability of an arbitration agreement are closely connected each other.

In this context, as mentioned in the previous chapter, the principle of

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<sup>98</sup> Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1989: p. 479.

<sup>99</sup> Komarov, A. "Mezhdunarodn'i kommercheskii arbitrazh v Rossii." Vneshnyaya Torgovlya. Vol. 4, 1995: p.19.

<sup>100</sup> Gross, Peter QC. "Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill." Arbitration International. Vol. 11, No. 1, 1995: p. 85 at 86.

separability of an arbitration agreement strongly guarantees, temporarily or permanently, the existence of the valid arbitration agreement. In Russia, this leads to the principle of Kompetenz-Kompetenz, which includes the jurisdiction to examine the existence or validity of an arbitration agreement.

Thus, as regards the principle of Kompetenz-Kompetenz, the “first” Kompetenz should be widely recognised in order to guarantee temporal jurisdiction of arbitral tribunal. Then, this Kompetenz should more carefully check the “second” Kompetenz from the point of the general principle of an arbitration agreement under the 1958 New York Convention or the law applicable to it, as mentioned above. Following this logic, courts should stay the proceedings in so far as there is an evidence of an arbitration agreement which can show *prima facie* a written offer and a written acceptance of the arbitration agreement by the names of *prima facie* competent parties, as mentioned above.

### III-C-3. Time-Limit for Objection to Tribunal's Competence

The claim that the arbitral tribunal lacks competence must be made not later than the lodging of answers to the case. Appointment of an arbitrator by that party does not deprive the party of the right to make such an objection (Article 16-2 of the 1993 Law on the ICA). Failure to make such a claim within the stipulated time should operate as a waiver of the right.<sup>101</sup> However, the arbitral tribunal may accept a later claim, if it considers the delay justified (Article 16-2 of the 1993 Law on the ICA).

The arbitral tribunal has a choice whether to decide its own competence as a preliminary at the early stage of the arbitral proceedings, or in the final award. The arbitral tribunal can assess the risk of delaying the arbitral proceedings and wasting money and time to continue the proceedings to the end.<sup>102</sup> When the arbitral tribunal accepts the claim initially and decides its own competence, the party can ask a national court to decide the matter within 30 days after receiving notification of the decision on the arbitral tribunal's own jurisdiction. The decision of the national court shall not subject to appeal. While such a request is pending, the arbitral tribunal can continue arbitral proceedings and make an award (Article 16-3 of the 1993 Law on the ICA).

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<sup>101</sup> Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1989: p. 479.

<sup>102</sup> *Id.*, p. 486.

Neither the 1993 Law on the ICA nor the UNCITRAL Model Law provides cases where the court decided that the arbitral tribunal has no competence. The arbitral tribunal may be able to continue the arbitral proceedings, however awards issued by such an arbitral tribunal are subject to appeal (Article 34-2-(1)).

As mentioned above, the party's right to object to the arbitral tribunal's jurisdiction is limited before answering on the merits. This is true of England and Russia, both of which introduced similar rules from the UNCITRAL Model Law.

As regards the arbitral tribunal's competence, the parties can agree directly to ask a court to decide on the jurisdiction of the arbitral tribunal in England. The parties can also agree to request the arbitral tribunal's decision in either the preliminary award or the final award. In the absence of the parties' agreement, the arbitral tribunal has discretion to determine its own competence in either the preliminary award or the final award in England.

Not only in England but also in Europe, there is a belief that arbitration is the universally common way of dispute settlement. Thus, a wide range of powers can be granted to the arbitral tribunal including determination of its own competence. The system of arbitration can, to considerable extent, act like a court. Russia has put in place such a system by introducing the UNCITRAL Model Law. In Russia, the arbitral tribunal has a choice whether to decide its own competence as a preliminary matter at the early stage of the arbitral proceedings or in the final award.

In Japan, to the contrary, arbitration is not a familiar method of dispute settlement, therefore there has been no strong motive to grant wide power to arbitral tribunals. It is still not clear whether or not the arbitral tribunal should decide on its own competence.

As mentioned above, in theory, in all three countries, the arbitral tribunal can, at its discretion, continue the arbitral proceedings even if there is doubt over jurisdiction. If the courts ultimately deny the jurisdiction on appeal, all the preceding arbitral proceedings have been in vain. Although arbitral tribunals should be cautious about court's intervention to arbitration, they should have discretion to refer the decision as regards its own jurisdiction to the courts, in order to avoid eventual adversary decision of courts in appeal to arbitral awards at the very end of dispute resolution.

## III-D. Stay of Court Proceedings

### III-D-1. Jurisdictional Issue

#### III-D-1-a. Under the 1923 CPC

As mentioned in the previous chapter, traditionally, the treteiskii court or arbitration court could hear only disputes which had already arisen based on submission of the parties in Russia.<sup>103</sup> In the early period of the Soviet regime, Article 2 of the 1924 Statute on Treteiskii Court<sup>104</sup> provided that an agreement to submit to arbitration all disputes which may arise in the future should not deprive the parties of the right to apply to the proper court under the general rules of the 1923 CPC. The reason for this was that enforcement of such an agreement may be prejudicial to the weaker party.<sup>105</sup> The courts were not therefore obliged to stay legal proceedings even if there was an arbitration agreement.

The USSR was not a member country of the 1923 Geneva Protocol which recognised agreements to arbitrate future disputes, and consequently, staying court proceedings on the grounds of the existence of an arbitration agreement. The Soviet understanding was not in harmony with international practice of commercial arbitration. The Soviet government, therefore, established the 1932 Statute on the FTAC which was independent from the 1923 CPC and was applied only to international commercial arbitration.

The FTAC was given parallel status with the national courts by amendment of Article 23 of the 1923 CPC in 1934.<sup>106</sup> At this point, theoretically, the principle of staying court proceedings was accepted in the USSR. Furthermore, under the traditional procedural theory, an arbitration agreement is classified as procedural contract, which establish another quasi-state jurisdiction. Consequently, the FTAC had exclusive jurisdiction on international commercial disputes. Then, courts must stay proceedings and transfer such disputes to the FTAC.

The Soviet court might, in practice, stay proceedings on the grounds of the existence of an arbitration agreement, but such cases were very rare because Soviet foreign trade organisations were, in practice, indirectly forced to settle international commercial disputes in the FTAC,<sup>107</sup> and to make an arbitration clause to this effect.

<sup>103</sup> For example, in the Period of the Russian Empire, Article 1367 of the 1864 CPC provided that all person having right to freely dispose property could refer **existing** disputes to one or odd number of mediators by mutual agreement (see, Saatchian', A. P. Ustab' Grazhdanskago Sudoproizvodstva. St. Petersburg: Izdanie Yuridicheskago Knizhhago Magazina, 1911).

<sup>104</sup> Gsovski, Vladimir. Soviet Civil Law Vol. 2. Michigan: University of Michigan Law School, 1949: pp. 663-667.

<sup>105</sup> Rashba, Evsey S. "Settlement of Disputes in Commercial Dealings with the Soviet Union." Columbia Law Review. Vol. 45, 1945: p. 530 at 536.

<sup>106</sup> Sobranie Zakonov i Rasporyazhenii SSSR. No. 5, 1934: Item 31.

<sup>107</sup> This was because there was a tacit understanding that Soviet rules of contracts with foreign enterprises were so difficult that disputes must be settled in the USSR. For example, the Resolutions of the USSR Central Executive Committee and Council of People's Commissions on 26th December 1935 and 8th December 1936 provide that: "the trade representatives are authorised to sign independently, contracts involving in each case up to 400,000 rubles. A single signature on contracts

### III-D-1-b. Recent Practice in Courts

Since the FTAC and AC had, in practice, exclusive jurisdiction over disputes arising in international trade, the courts were obliged to refer parties to arbitration automatically even prior to the commencement of court proceedings, and indeed before any party to the dispute presented an official statement concerning the substance of the dispute. Article 129-(2) of the 1964 CPC provides that the judge will refuse to accept a statement of claim if the interested person who resorted to the court has failed to observe any procedure for the preliminary extra-judicial settlement of the case as laid down by law for the given category of cases. The Russian courts, therefore, adopted the principle of transferring the dispute to the FTAC without being requested by either party.<sup>108</sup>

Professor Lebedev explains the principle of staying litigation, based on the positive legal norm theory, that an arbitration agreement is regarded as having a legal force which excludes the right of the parties to bring disputes to national courts.<sup>109</sup> Accordingly, Article 27 of the 1964 CPC governs the transfer of cases based on an arbitration agreement.

In *Ingostrakh v. Aabis Rederi and Sovfrakht*,<sup>110</sup> the Soviet insurance company 'Ingostrakh' sought recovery of payments for cargo losses from the Norwegian ship owner 'Aabis Rederi' and Soviet charterer 'Sovfrakht.' The Civil Department of the Moscow City Court concluded that Sovcraft should bear liability for the damage, and added that this did not prevent Sovfrakht from claiming corresponding compensation from Aabis. However, this could not be decided by the Court because of the arbitration clause which referred all disputes arising from the time charter to arbitration in London or other place as was agreed by the parties. The Court stated that the duty of the court to recognise such arbitration agreements followed from both Article 27 of the Russian CPC and Article II-3 of the 1958 New York Convention.

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involving sums exceeding this amount requires in each case a permit from the People's Commissar for Foreign Trade. Moreover, the above resolutions establish rules of procedure for the signing of contracts in the name of the Soviet legal entities engaged in foreign trade. Contracts involving foreign trade made by such organisations in Moscow must be signed by two persons, one of whom must be the president of the organisation or his deputy, and the other, a person authorised to sign contracts for foreign trade under a power of attorney issued by president of the organisation" (Gsovski, Vladimir. *Soviet Civil Law Vol. 2*. Michigan: University of Michigan Law School, 1949: p. 471).

<sup>108</sup> Hobér, Kaj. "Arbitration in Moscow." *Arbitration International*. Vol. 3, No. 2, 1987: p. 119 at 139.

<sup>109</sup> Lebedev, Sergei N. *Mezhdunarodnyi Kommercheskii Arbitrazh: Kompetentsiya Arbitrov i Sograshenie Storon*. Moscow: Torgovo-promyshlennaya Parata SSSR, 1988: p. 13.

<sup>110</sup> *Ingostrakh v. Aabis Rederi and Sovfrakht*. *Yearbook Commercial Arbitration*. Vol. 1, 1976: p. 206.

The 1991 Principles of the CL adopts a similar provision. Article 6 of the 1991 Principles of the CL provides that protection of civil rights is done by courts, arbitrazh courts, and, based on the agreement of the parties, treteiskii court. Recently, Article 11 of the 1994 CC also provides that the protection of any violated or disputed civil rights shall be carried out by a court, arbitrazh court, and treteiskii court, in accordance with the jurisdiction set by procedural law to which the cases are subject to. Thus, treteiskii courts based on an arbitration agreement, which has legally autonomous power, are granted parallel status with national courts.<sup>111</sup> In this context, the principle of stay of court proceedings on the grounds of an arbitration agreement is fully recognised in Russia.

Not only the civil code but also the law on international commercial arbitration itself provides for a stay of court litigation on the basis of the existence of an arbitration agreement. Article 8 of the 1993 Law on the ICA provides that if a case which appears to concern a subject dealt within the arbitration agreement is brought to a court, that court must, if any of the parties so requests, not later than such time as the case is first heard in court concerning the dispute, abandon proceedings, and refer the parties to arbitration, unless it finds that this agreement is ineffective, and has ceased to have effect, or cannot be fulfilled.

Thus, recently, the issue of staying court proceedings is clearly provided for in the civil code, the civil procedure code, and the law on international commercial arbitration. However, it seems to be the arbitrazh court that is more likely to be involved in the issue of staying court litigation, although the 1993 Law on the ICA concerns only ordinary courts in this regard.

### III-D-1-c. Recent Practice in Arbitrazh Courts

Recently, Article 87-(2) of the 1995 Arbitrazh PC provides that the arbitrazh court should stay the action without examination if there are proceeding between the same parties referring to the same subject-matter and on the same basis in arbitration; or if there is an agreement between the parties to refer the dispute to settlement to arbitration; or if the possibility of referring to arbitration has not been lost, and the defendant objecting to the examination of the dispute in an arbitrazh court submitted a petition to refer the dispute to settlement of arbitration before his first statement on the substance of the dispute.

The question of jurisdiction is complex in Russia. Arbitrazh courts have jurisdiction over domestic arbitration. However, once the seat of international

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<sup>111</sup> Boguslavskii, M. M. Mezhdunarodnyi Kommercheskii Arbitrazh. Moscow: Akademicheskii Pravovoi Universitet, 1993: p. 9.

commercial arbitration is confirmed in Russia, ordinary courts have jurisdiction.

Although it has not been pointed out clearly, arbitrazh courts are more likely to be involved with issues of staying litigation involving foreign elements than ordinary courts are, because the issue of staying litigation is likely to arise when the existence of an arbitration agreement is in doubt, and if there are foreign elements in disputes, it is the arbitrazh court that hears the disputes.<sup>112</sup> Therefore, although ordinary courts have jurisdiction over international commercial arbitration held in Russia, arbitrazh courts are likely to be involved in the issue of staying litigation on the basis of a request by the other party. Until the seat of arbitration is confirmed, both ordinary and arbitrazh courts can be involved in international commercial arbitration in Russia.

### III-D-1-d. Contradiction with the Traditional View

As mentioned in the previous chapter, the principles of separability of an arbitration agreement and *Kompetentz-Kompetentz* conflict with the stay of court proceedings. Both principles strongly guarantee on a temporary basis the existence of the valid arbitration agreement. However, when the court proceedings have commenced, and a stay is requested by a party, the effects of these principles are denied. The court must fully examine all the issues including the validity of an arbitration agreement. This goes against the principles of separability of an arbitration agreement and *Kompetentz-Kompetentz*.

Under the USSR regime, this contradiction did not occur in so far as international commercial arbitration was concerned, as the permanent arbitral institutions such as the FTAC and AC had, in practice, exclusive jurisdiction over disputes arising from international trade. Therefore, the practice was that courts referred disputes to arbitration even before the party requested them to do so.

But more recently, Article 8 of the 1993 Law on the ICA provides that if a case which appears to concern a subject dealt within the arbitration agreement is brought to a court, that court must, if any of the parties so requests, not later than such time as the case is first heard in court, abandon proceedings, and refer the parties to arbitration, unless it finds that this agreement is ineffective, and has ceased to have effect, or cannot be fulfilled. Thus, courts must fully examine whether or not, the arbitration agreement is ineffective, and has ceased to have effect, or cannot be fulfilled.

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<sup>112</sup> Article 22-6 of the 1995 Arbitrazh PC provides that the arbitrazh court examines cases involving organisations and citizens of the RF and also foreign organisations, organisations with foreign investments, international organisations, foreign citizens, person without nationality engaging entrepreneurial activity, unless others are regulated by international treaties of the RF.

Under Article 16-1 of the 1993 Law on the ICA, the principle of separability of an arbitration agreement is established for the purpose of the principle of Kompetenz-Kompetenz. Under the UNCITRAL Model Law or 1993 Law on the ICA, the arbitral tribunal's jurisdiction to examine its own competence including the validity of the arbitration agreement is strongly guaranteed. With this in mind, courts should not always fully examine the validity of an arbitration agreement. Courts should refer disputes to arbitration without careful examination of the validity of an arbitration agreement on the basis of some evidence of an arbitration agreement, as mentioned in the previous sections, that is, an evidence of an arbitration agreement which can show *prima facie* a written offer and a written acceptance of the arbitration agreement by the names of *prima facie* competent parties.

### III-D-2. Time-Limit of Request of Stay

Since the 1993 Law on the ICA copies the UNCITRAL Model Law, it has the same time-limit for request of stay. Article 8 of the 1993 Law on the ICA provides that if a case which appears to concern a subject dealt within the arbitration agreement is brought to a court, that court must, if any of the parties so requests, not later than such time as the case is first heard in court, abandon proceedings, and refer the parties to arbitration, unless it finds that this agreement is ineffective, and has ceased to have effect, or cannot be fulfilled.

According to the original UNCITRAL Model Law, the time at which the case is first heard in court is the time when the first statement on the substance of the dispute is submitted to the court.<sup>113</sup>

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<sup>113</sup> See, Holtzman, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1989: p. 305.



# PART IV. Epilogue

## Chapter 7. Conclusion: Suggestions for Harmonisation

Arbitration is the most basic form of dispute settlement. Every society has a system of arbitration, or its functional equivalents, which are firmly rooted in the society. Therefore, any project aimed at harmonisation of the law on arbitration must be dealt with sensitively and should not threaten unnecessarily traditional systems of dispute settlement different jurisdictions, although it may be that individual systems have long been developed in harmony with its international development. It is arguable that England falls into this latter category.

On the other hand, it is in the interests of the international business community to harmonise not only the rules on arbitral institutions but also the substantive law on arbitration in each country in order to facilitate dispute settlement. With this in view, the UNCITRAL Model Law was established with its distinction between domestic and international arbitration. A relatively easy way to approach harmonisation is thus to consider the rules on arbitration in the international context, separated from domestic system of arbitration, and then attempt harmonisation between domestic rules and international rules.

The advantage of approaching harmonisation in this way is, first and foremost, that it is easier to understand arbitration in its own specific regime because of its distinctiveness. Arbitration is a unique system of dispute settlement, parallel with and independent of the court. (Indeed its flexibility and adaptability to the international perspective mark it out from the conventional court structure.)

Moreover, international commercial arbitration is highly developed in the international context. The success of international conventions such as the 1958 New York Convention and the UNCITRAL Model Law is already well established. Consequently, many of the concepts and principles of international commercial arbitration have been clarified, to significant extent, in the international context. Under these circumstances, some rules can be inferred from these conventions by analogy as international rules. Various examples have been discussed in the preceding chapters and can be summed up as follows.

## Jurisdictional Issues

The rules on jurisdiction relating to arbitration should be considered in the context of international commercial arbitration. When there is no agreement as regards the determination of seat, different jurisdictions should co-operate with each other to find the most suitable jurisdiction.

Under the seat theory, arbitration is governed by the law of the place where the arbitration is held. Although this appears self-evident, it is a unique, very important jurisdictional rule in the field of arbitration. The seat theory brings exclusive rules on jurisdiction. Other exceptional rules to the seat theory on jurisdiction over arbitration must be established legislatively or as court practice if jurisdiction is to be recognised before the seat is confirmed.

Where the seat theory cannot be accepted, the seat of arbitration in that country is also a very significant factor, but it has equal status with other rules on jurisdiction. Consequently, even before the seat is confirmed, the court in that country can have jurisdiction if there are some reasons in support of this, and these may be established by analogy with the general rules on international jurisdiction in that country.

Whether the seat of arbitration or the court jurisdiction over arbitration is determined first, courts must in any event determine the issue of jurisdiction. In this situation, it would be desirable for courts to request international judicial co-operation when it considers that another jurisdiction is more suitable. It may be, for example, that the other party resides in that country, an award is to be enforced in that country, or the law applicable to the arbitration agreement is the law of that country.<sup>1</sup> The foreign court may decide the seat of arbitration as being in its own or in a neutral country, or appoint an arbitrator to determine the seat of arbitration.

This may be accomplished by simple judicial co-operation between the original court and the foreign court, rather than by a new treaty on judicial co-operation. If there is reluctance to recognise such a practice on a general scale, then, as a last resort, the possibility of an international treaty to this effect should be considered.

Chapter 3 focused upon an important preliminary jurisdictional issue, namely the determination of existence or validity of an arbitration agreement. It is possible in certain cases that several jurisdictions could be claimed. If one of the parties to an arbitration agreement commences litigation in a court in country A, and the other party requests the same court to set aside the litigation, the court in country A has

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<sup>1</sup> Yoshida, Ikko. "Determination of the Seat of Arbitration under the Arbitration Act 1996." Arbitration: the Journal of the Chartered Institute of Arbitrators. Vol. 64, No. 4: p. 292.

jurisdiction based on Article II-3 of the 1958 New York Convention. The question of the time-limit within which the other party must request the stay of the litigation should be determined by the law of the forum. If the other party makes no response to the litigation, that party may be deemed to have waived the right to participate in arbitration proceedings for all purposes in all jurisdictions.

However, if when court proceedings are promoted, the other party starts arbitration with the assistance of the court in the country designated by the arbitration agreement, and then, seeks an injunction in that court to stop the court proceedings in another jurisdiction, there is no way to co-ordinate the issue of competing claims for jurisdiction. The other party may also bring an action to confirm the existence or validity of the arbitration agreement in the court of his or her own country. This is assuming that proper notice of the injunction or litigation has been made to the court in the other jurisdiction.

This type of competing claim situation cannot be solved without a unified rule. It is desirable to establish a unified rule on this matter. Until then, a comprehensive agreement as to the application of Article II of the 1958 New York Convention goes a long way towards solving the problem of competing claims as to jurisdiction.

By analogy with Article II of the 1958 New York Convention, if the sole basis of jurisdiction is that a country has been designated as the place of arbitration in a disputed arbitration agreement, the courts of the member countries of the 1958 New York Convention should recognise their jurisdiction to determine the existence or validity of an arbitration agreement in restricted circumstances. They should do so only when there is *prima facie* written evidence of an arbitration agreement, or an exchange of letters, faxes or telegrams which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, unless both the parties agree on jurisdiction.<sup>2</sup>

If courts find such written evidence, disputes should be referred to arbitration rather than to the court in order to determine the existence or validity of an arbitration agreement. This means that the court should recognise the jurisdiction, and refer the parties to arbitration on the basis of the above written evidence. If such a reference cannot be made, the other court which was asked to stay proceedings should have exclusive jurisdiction.

If the party A first requests a court to appoint arbitrators on the behalf of the party B on the basis of a disputed arbitration agreement before commencing court

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<sup>2</sup> Yoshida, Ikko. "Lessons from the Atlantic Emperor: Some Influence from the Van Uden Case." Arbitration International. Vol. 15, No. 4, 1999: p. 359.

litigation, there are also several possibilities as regards jurisdiction to examine the existence or validity of the arbitration agreement. Needless to say, the party B can respond to the court where the request to appoint arbitrators was made. But the party B may also commence a court litigation in another jurisdiction. However, in this case, the principal issues may be substantive ones arising from the main contract rather than the existence or validity of the arbitration agreement.

Since the party B is reluctant to respond to the arbitration, he or she is likely to commence litigation in another jurisdiction instead of arbitration. Such jurisdiction is likely to be established for example in the foreign country where the party A resides. Since the party A commenced the arbitration with the assistance of another jurisdiction, the party B is very likely to be respondent in arbitration or defendant in court in this claim. Where court litigation has been initiated against the party A in another jurisdiction, the court is very likely to be in the country where the party A resides.

When the party A requests a court to appoint arbitrators on the behalf of the party B, jurisdiction is likely to be established in the foreign court. In this case, the possibilities are likely to be limited to the jurisdiction where the request of the appointment of arbitrators was made or where the party A resides. This is a factor which may favour the party A requesting the appointment of arbitrators.

There is another possibility for jurisdiction: the court of the party's own country. However, jurisdiction should only be recognised in this way in restricted circumstances, otherwise there are as many possibilities for jurisdiction as there are parties in the dispute. Jurisdiction of the party's own country to examine the existence or validity of an arbitration agreement should be recognised only when the party A has requested a court to appoint arbitrators on the behalf of the party B on the basis of a disputed arbitration agreement.

Thus, if the party A to an arbitration agreement first commences litigation in a court in a certain country, jurisdiction should be either the one which is established by a request of a stay based on Article II-3 of the 1958 New York Convention or the one established by the existence of *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties.

If the party A first requests a court to appoint arbitrators on the behalf of the party B on the basis of a disputed arbitration agreement before a court litigation is commenced, the party B's jurisdiction to examine the validity of the arbitration agreement should be limited to either that court through which the party B responds to the claim or the court of the party B's own country (see, Table C7-1).

In order to implement the above rules, proper notice of the injunction or litigation for confirmation must be made among courts in each country, and it would be desirable for a system of communication to be developed so that such information was regularly shared.

Table C7-1 Jurisdiction over Issues Relating to Arbitration

Circumstances	Jurisdiction
A party to an arbitration agreement first commences litigation in a court in a certain country.	Jurisdiction which is established by the corresponding request of a stay based on Article II-3 of the 1958 New York Convention,  or  Jurisdiction which is established by the existence of <i>prima facie</i> written evidence which can show a written offer and a written acceptance of the arbitration agreement by <i>prima facie</i> the names of competent parties.
A party first requests a court to appoint arbitrators on the behalf of the other party on the basis of a disputed arbitration agreement.	Jurisdiction which is established by responding claim to examine the validity of an arbitration agreement,  or  Jurisdiction of the other party's own country.

Classification of an Arbitration Agreement

As we have seen in the preceding chapters, the classification of an arbitration agreement directly or indirectly influences issues of international private law such as the law applicable to the capacity of a person to enter into an arbitration agreement and the law applicable to an arbitration agreement. It also affects issues relating to law on arbitration such as separability of an arbitration agreement, assignment of an arbitration agreement, Kompetenz-Kompetenz, and stay of court proceedings on the basis of an arbitration agreement.

The classification of an arbitration agreement varies as between England, Japan and Russia. Indeed, no classification can fully explain the unique characteristics of an arbitration agreement. The law on arbitration, which provides rules on judicial control of arbitration, is totally domestic, procedural law. Dicey once stated: "An agreement to submit to arbitration is by its nature procedural: it is not intended to define the mutual rights and obligations of the parties; but to regulate

the manner in which they are determined."<sup>3</sup> Thus, by its nature, an arbitration agreement is procedural.

In so far as procedural issues under the law on arbitration are concerned, they must be exclusively examined by domestic procedural law, and consequently they have no connection with international private law and thus foreign substantive or procedural law. The crucial point is that, although the law applicable to arbitration is procedural, and therefore rooted in a particular jurisdiction, typically arbitration has an international dimension in terms of the parties and issues involved. Herein lies the peculiarity of arbitration. Although arbitration is similar to court proceedings, and regulated by domestic procedural law, the very basis of arbitration is that an arbitration agreement arises from a simple agreement between private persons. Such an agreement may very easily involve foreign parties and be concluded in a foreign country.

Whatever the classification of an arbitration agreement is, the basic function is the same. An arbitration agreement is located at the point of contact between domestic and foreign law and also between procedural and substantive law (see, Table C7-2). This creates a paradox. Although an arbitration agreement is a simple agreement with international dimensions, it is regulated by exclusively domestic procedural law. To overcome this paradox, each system of arbitration in England, Japan and Russia has created a unique understanding.

In England, by design or otherwise, this problem has been solved through the fusion of domestic and international commercial arbitration. Under Common law, an arbitration agreement is, irrespective of its procedural element, treated as an ordinary contract, which can most easily solve the above problems. An arbitration agreement is, by its nature, procedural, as within A in the Table C7-2. Since an arbitration agreement is treated as an ordinary contract, domestic substantive contract law can readily be applied to it, which is shown as B in the Table C7-2. Because of the classification of an arbitration agreement as ordinary contract, international private law makes possible the application of foreign substantive or procedural law (C and D in the Table C7-2).

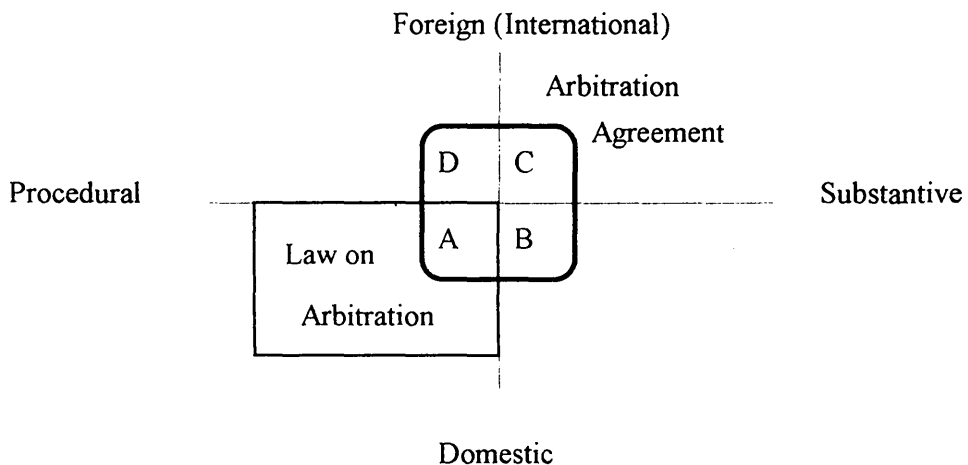
In Japan, on the other hand, the distinction between the domestic law on arbitration and international private law solves the problem of the application of domestic substantive law and foreign procedural or substantive law through international private law. As mentioned above, in so far as an arbitration agreement is classified as a contract under procedural law (A in the Table C7-2), it is

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<sup>3</sup> Morris, J. H. C. ed. Dicey and Morris on the Conflict of Laws Vol. 2, 10th ed. London: Stevens & Sons Ltd., 1980: p. 1126.

impossible to apply domestic substantive law, conflict of laws rules and consequently foreign law. The separate classification as a contract under substantive law in terms of international private law (B in the Table C7-2) permits the application of foreign law to deal with international elements (C and D in the Table C7-2).

Table C7-2 Classification of an Arbitration Agreement and the Law Applicable to It



In Russia, the paradox has been solved by the introduction of the law on international commercial arbitration. The 1993 Law on International Commercial Arbitration clearly distinguishes international commercial arbitration from domestic commercial arbitration. Under international commercial arbitration, the FTAC, AC, and ICAC and national courts tend to classify an arbitration agreement in the context of the procedural theory, indicated as A in the Table C7-2. However, the Law on International Commercial Arbitration makes it possible to understand arbitral issues in an international context (D in the Table C7-2). For example, the theory of application of conflict of laws rules inferred from international conventions permits the application of foreign or domestic substantive or procedural law (B, C and D in the Table C7-2).

Thus, in all three countries, an arbitration agreement functions as an agent which combines domestic and foreign (international) law and also procedural and substantive law. Whatever theory on classification is followed in England, Japan and Russia, an arbitration agreement in all three countries covers A, B, C and D in the Table C7-2. It is thus impossible to explain this unique nature of an arbitration agreement by classification as an ordinary contract, or a contract under substantive or procedural law. It can be fully explained only in the specific regime of international

commercial arbitration.

For the purpose of harmonisation, an arbitration agreement should be understood in the context of a *sui generis* contract in an international context, while invoking rules inferred from traditional classification of an arbitration agreement as ancillary in each country. This *sui generis* contract is in nature procedural, but permits the application of domestic substantive law, conflict of laws, and consequently foreign substantive or procedural law. This points to a route for harmonising the international private law on arbitration agreements.

## Issues on International Private Law

When an arbitration agreement is classified as a *sui generis* contract, it is possible to classify it uniformly under the 1958 New York Convention. Consequently, unified rules can be inferred from the 1958 New York Convention, but in order to do this, a unified method is necessary.

International conventions relating to arbitration have been established by representatives from each jurisdiction so as not to conflict with the respective domestic rules.<sup>4</sup> The interpretation of provisions of international conventions is generally based on domestic rules in each jurisdiction, unless clear methods of interpretation are suggested by conventions themselves or their protocols. The method of interpretation is different in each jurisdiction. One jurisdiction may emphasise objectives of conventions, another may consider the spirit of preambles of treaties, and the other may take into account the interpretation of international tribunals or international practice.<sup>5</sup>

Subject to the minimum requirement of observing obligations under the conventions, each jurisdiction interprets their provisions in accordance with domestic rules of interpretation. Thus patterns of interpretation in individual jurisdictions assist the interpretation of the conventions themselves when they are studied comparatively in the international context. This means that there are two strands in the interpretation of international conventions, one drawn from domestic rules, and the other from international conventions themselves. Needless to say, each jurisdiction should be free to apply its own interpretation of international

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<sup>4</sup> See, Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994; Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994.

<sup>5</sup> See, e.g. "VII Treaties and the Interpretation of Statutes" Section 76 (footnote 167). Interpretation of Statutes, Law Com. No. 21.



conventions. At the same time, each jurisdiction should consider the development of the interpretation of international conventions in the international context. It should go on from there to seek the point of harmonisation between domestic and international interpretations, rather than focusing exclusively on the former.

Some commentators may be sceptical about the development of the interpretation of international conventions in isolation. Even so, the consistent interpretation of international conventions in their own terms may ultimately lead to a real unified interpretation. Clearly the establishment of unified detailed rules and a unified method of interpretation in the form of a convention are desirable. However, it has to be said that the more successful a convention is, the more difficult it becomes to establish unified rules or a unified method of interpretation. Usually the reason for the success of the convention is its flexibility. As a result, more countries sign it, but this results in turn in difficulty in establishing agreement on unified rules or interpretation.

The 1958 New York Convention falls in this category. It is regarded as one of the most successful examples of unification of law. More than 110 countries have acceded to it.<sup>6</sup> However, it does not establish unified detailed rules and a unified method of interpretation. One effective method of harmonisation must therefore be to seek harmonisation between domestic and international interpretations of the 1958 New York Convention. At this point there is dynamism in comparative research into the development of interpretation of conventions in an international context.

In order to assist unified interpretation and practice, a review of the court decisions on the 1958 New York Convention has been undertaken to consider whether the Convention is interpreted uniformly by the courts.<sup>7</sup> Through such comparative study, some rules on arbitration can be inferred from the 1958 New York Convention in the interests of enforceability of arbitral awards, irrespective of proceedings concerning the recognition and enforcement of arbitral awards or staying litigation. The way forward for harmonisation between domestic rules on arbitration and that inferred from the 1958 New York Convention can thus be traced.

Chapter 3 proposed one specific jurisdictional rule to avoid competition of jurisdiction, based on Article II of the 1958 New York Convention. Some conflict of laws rules can also be derived from this. As mentioned above, the classification of an arbitration agreement should be based not on domestic law but the general principles

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<sup>6</sup> As of July 1997, 112 countries have made access to the 1958 New York Convention ("New York Convention of 1958 List of Contracting States." Yearbook of Commercial Arbitration, Vol. XXII, 1997: p. 588).

<sup>7</sup> See, e.g., "Court Decisions on the New York Convention 1958." Yearbook of Commercial Arbitration, Vol. I-XXII, 1976-1997.

in the international context under the *sui generis* theory. It may be sufficient to examine whether or not an agreement satisfies the general principles of an arbitration agreement under the 1958 New York Convention, which parallels the general principles drawn from comparative study for unification of law on international commercial arbitration. The general definition of an arbitration agreement may be an agreement of the parties to refer disputes to a third party and to be bound by that decision. The special conflict of laws rules can thus be inferred from the 1958 New York Convention.

Article V-1-(a) provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. From this provision, the law applicable to an arbitration agreement should be the law to which the parties agreed to submit, or, failing such an indication, the law of the country where the award was or is to be made. These rules are in the interests of enforceability.

If the general principles of an arbitration agreement under the 1958 New York Convention are not satisfied, resort should be made to the ordinary means of classification in order to determine which law is applicable to it in a given jurisdiction.

Similarly, under the *sui generis* classification in an international sense, it is desirable to establish unified conflict of laws rules on the applicable law to the capacity to enter into arbitration agreement, especially unifying it with the law applicable to the capacity to make pleading as discussed in Chapter 5.

It is also easier for judges especially in civil law countries to examine the validity of an arbitration agreement by applying rules inferred from the 1958 New York Convention under the *sui generis* classification.

In England, foreign law is incorporated into English law and regarded as fact, therefore foreign law is understood in the context of English law. In relation to an arbitration agreement, the rules relating to ordinary contract in a foreign country will be applied, even if the general theory in that foreign country regards an arbitration agreement as a procedural contract, unless a party can prove the contrary interpretation is applied in the foreign country.

In contrast, in Japan and Russia, foreign law is applied as law in the context of the foreign legal system. It is a judge who must examine the foreign law and apply it within the context and system of that foreign law. The classification of an

arbitration agreement varies from country to country, and this variation affects almost the entire system of the law on arbitration and international private law as mentioned in chapters 4, 5 and 6. There are difficulties not only of language but also of legal interpretation. Some scholars go so far as to suggest that there are limitations to a judge's ability to study and understand foreign laws.<sup>8</sup>

Rather than studying the interpretation of classification of an arbitration agreement and its effects in each country, an arbitration agreement should be classified as a *sui generis* contract in an international context, and its validity should be examined simply by rules inferred from the 1958 New York Convention. In this way, judges in Japan and Russia need not bear the tremendous burden of studying foreign law on arbitration in detail, at least when there is an arbitration agreement under the 1958 New York Convention.

### Separability of an Arbitration Agreement

Under the *sui generis* classification of an arbitration agreement, there are some rules which can be unified in the specific regime of international commercial arbitration in terms of the separability of an arbitration agreement, assignment of arbitration agreement, Kompetenz-Kompetenz, and stay of court proceedings on the basis of an arbitration agreement.

The principle of separability of an arbitration agreement is recognised in England, Japan and Russia, although the rationale is different. England established the principle of the separability of an arbitration agreement as a legal fiction, based on the parties' original wish. In Japan, the reason for recognising the principle of separability is not clear. Russia establishes the principle on the basis of a separate classification of the arbitration agreement and the main contract.

In practice, the principle of the separability of an arbitration agreement is established simply if an arbitration agreement can be recognised as independent of the main contract. This can be established if an arbitration agreement is, under the *sui generis* theory, granted legal force by Article II-3 of the 1958 New York Convention based on the theory of the function of the positive legal norm. This theory can be invoked when the invalidity of the main contract threatens to undermine the arbitration agreement. This, therefore, must be the internationally recognised principle.

The crucial point is the existence of the arbitration agreement rather than that of the main contract. The invalidity of the main contract hardly threatens the validity

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<sup>8</sup> Ishiguro, Kazunori. Kokusai-minji-funsô-shori no shinsô. Tokyo: Kabushiki-gaisha Nihon-hyôron-sha, 1992: pp. 217-250.

of the arbitration agreement because of the principle of separability of an arbitration agreement. In any case, the issue of the existence of an arbitration agreement is likely to arise in the case of stay of court proceedings on the basis of an arbitration agreement governed by a foreign law. Examination of the relationship between the invalidity of the main contract and the validity of the arbitration agreement under foreign law, in terms of the separability of an arbitration agreement, is the precondition for stay of court proceedings.

As mentioned above, in theory, Japanese and Russian judges must take full account of relationships between repudiation, rectification or initial invalidity of the main contract and the validity of the arbitration agreement in each case under foreign law. Such rules may vary in each country. This exercise is difficult and time-consuming.

Courts should be able to refer cases to arbitration on the basis of *prima facie* written evidence of an arbitration agreement which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties. The principles of separability of an arbitration agreement and Kompetenz-Kompetenz all function to guarantee the temporary existence of the valid arbitration agreement. Cases should be referred to arbitration if the existence of an arbitration agreement can be *prima facie* presumed. If such evidence exists, judges do not then need to spend time studying relationships between the invalidity of the main contract and the validity of the arbitration agreement under unfamiliar foreign laws.

If there is no such evidence, the court should refuse the stay. The party which requested the stay can then appeal by clarifying the reason why the arbitration agreement, which could not satisfy the *prima facie* requirement, is nevertheless valid under the law applicable to it. This then is the only point at which the judge needs to enquire into the foreign law.

### Assignment of an Arbitration Agreement

The principle of the separability of an arbitration agreement is a legal fiction. Indeed, the main contract and the arbitration agreement are closely connected to each other. Usually, the former contains the latter as an arbitration clause. Both are very often formed at the same place at the same time: an arbitration agreement is concomitant with the main contract.

As a rule peculiar to an arbitration agreement following the *sui generis* theory, an arbitration agreement should be assigned with the assignment of the main contract because of its concomitance with the main contract, provided that notices

are given to the other party and arbitrators. Since the rules on assigning contracts are well developed in most jurisdictions, the other party can object to the assignment of the main contract itself. This will prevent many of the problems on assignment of arbitration agreements from arising.

### Kompetenz-Kompetenz

The *sui generis* classification of an arbitration agreement also brings special characteristics on the principle of Kompetenz-Kompetenz. On the basis of the special rules on the principle of the separability of an arbitration agreement, if there is *prima facie* written evidence of an arbitration agreement which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties, the “first” Kompetenz should be widely recognised in order to guarantee interim jurisdiction of arbitral tribunal. Then, this Kompetenz should more carefully check the “second” Kompetenz if a party objects to its jurisdiction.

The principle of Kompetenz-Kompetenz, that is, determination of its own competence by the arbitral tribunal, is convenient in terms of time and money rather than referring the issue of the competence to courts whenever it is requested by parties. Abuse of the right of objection to the arbitral tribunal’s jurisdiction can however be encountered. Therefore, in order to minimise the abuse, time-limit for objections to jurisdiction should be set. Such rules would be useful if introduced in Japan.

In theory, in all three countries, the arbitral tribunal can, at its discretion, continue the arbitral proceedings, even if jurisdiction is in doubt. In such a case, if courts rule against jurisdiction in an appeal against arbitral awards, all the arbitral proceedings have been in vain, a considerable waste of time and money. Although arbitral tribunals should be cautious in inviting court intervention, they should have discretion to request the court to rule on the tribunal’s jurisdiction during the arbitral proceedings.

### Stay of Court Proceedings

In order to examine whether or not there is a valid arbitration agreement, the agreement must be classified, and the proper law must be applied to it. Therefore, it is natural that the court fully examines the existence or validity of the agreement if a stay is requested, and it is desirable that they should do so without preconceived ideas. Whether or not there is evidence for an arbitration agreement, the court can examine the existence or validity of the agreement generally in the light of the rules of ordinary contract, ignoring the special characteristics of an arbitration agreement.

Such courts proceedings may be commenced, for example, when one party believes that there is no arbitration agreement, or has overlooked an arbitration clause, or is attempting to delay resolution of the dispute whether by court proceedings or arbitration. Whatever the underlying reason, once court proceedings are commenced and a stay is claimed by one of the parties, the courts must fully examine the validity of any arbitration agreement.

The UNCITRAL Model Law, which the 1993 Law on the ICA copied in Russia, allows the issue of the validity of an arbitration agreement to be settled by the court before the parties are referred to arbitration. The Working Group preparing the UNCITRAL Model Law refused to add the term “manifestly” before the terms “the (arbitration) agreement is null and void” in Article 8.<sup>9</sup> As a result, courts must carefully examine the validity of an arbitration agreement on all occasions.

There are reasons why, on the other hand, arbitral tribunals rather than courts should have primary responsibility for examining the existence or validity of an arbitration agreement. First, there is an opinion that the words of Article 8 of the UNCITRAL Model Law should be read in conjunction with Article II-3 of the 1958 New York Convention, and the invalidity of an arbitration agreement should be accepted in manifest cases only, having regard to the “pro-enforcement bias” of the Convention.<sup>10</sup>

Secondly, there is the development of the principles of separability of an arbitration agreement and *Kompetenz-Kompetenz*, which strongly assume the interim existence of the valid arbitration agreement for expediency. This suggests that courts should begin examination of the agreement not with an open mind but with preconceived ideas in favour of an arbitration agreement. If there is some evidence which can manifestly presuppose the existence of an arbitration agreement, courts should refer disputes to arbitration, and the arbitration should fully examine the existence or validity of an arbitration agreement.

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<sup>9</sup> Holtzmann, Howard M. and Neuhaus, Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration History and Commentary. Boston: Kluwer Law and Taxation Publishers, 1994: p. 303.

Article 8-1 provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

<sup>10</sup> Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: p. 155.

Article II-3 of the 1958 New York Convention provides that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Thirdly, arbitration is means of dispute settlement independent of and parallel with court litigation. In every society, there is an inevitable social requirement for a system of dispute settlement. In order to settle disputes, the systems of arbitration, compromise, court litigation, and other systems of alternative dispute resolution have been established according to social needs. Essentially, the purpose of these systems is the same, that is, to settle disputes. Each system has its own characteristics. Put quite simply, court litigation has the characteristics of strong consideration of the realisation of legal rights and obligations, and consequently the maintenance of the legal order.<sup>11</sup> In so far as arbitration is an independent system of dispute settlement, it is sensible that arbitral tribunals should examine the existence or validity of an arbitration agreement when there is evidence which clearly points to the existence of an arbitration agreement.

After all, this is the problem of balance between courts and arbitration. In a sense, the court presumes the non-existence of an arbitration agreement from the beginning, while the arbitration assumes its existence. The only practical way to overcome this contradiction in the context of harmonisation is compromise from each side.

As a compromise, courts should check only whether or not there is evidence of an agreement on arbitration. The term "arbitration" or its equivalent in a written form may be sufficient. The crucial points may be definition of a written form and the capacity of the parties. The following should be standard criteria: *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of competent parties.

On the basis of this rule, when there is no such evidence, courts should carefully examine the validity of an arbitration agreement. However, when there is such evidence, they should refer disputes to arbitration without careful examination of the validity of an arbitration agreement.

This rule can, to some extent, avoid cases referred to arbitration where the arbitral clause is too vaguely worded. Even if there is such a written evidence, there are, however, many other cases where an arbitration agreement will be regarded as null and void, inoperative or incapable of being performed. The agreement will be null and void, for example if there is lack of consent between the parties or lack of capacity of one of the parties to enter into an arbitration agreement. It will be inoperative, if there has been a settlement between the parties before arbitration.<sup>12</sup>

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<sup>11</sup> Mikazuki, Akira. Minji-soshô-hô. Tokyo: Kabushiki-gaisha Yûhikaku, 1959: p. 6.

<sup>12</sup> Berg, Albert Jan van den. New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1994: pp. 156-158.

These cases can, however, be heard in courts when objections to the jurisdiction of the arbitral tribunal are made by one of the parties.

This rule is also significant in terms of international jurisdiction. On the basis of this rule, when there is no such evidence, courts which have been asked to grant a stay should carefully examine the validity of an arbitration agreement. Thus, jurisdiction of that court is firmly established in conformity with Article II-3 of the 1958 New York Convention.

When there is such evidence, courts should refer disputes to arbitration without careful examination of the validity of an arbitration agreement. This is a kind of an indirect transfer of jurisdiction. After referring the disputes, they must be heard in arbitration, issues arising from which fall within the jurisdiction of the country where the arbitration is held.

## Epilogue

In terms of jurisdictional issues and also the law on arbitration, such *prima facie* rules on the existence of an arbitration agreement under the *sui generis* classification of an arbitration agreement remove many obstacles in international commercial arbitration: *prima facie* written evidence which can show a written offer and a written acceptance of the arbitration agreement by *prima facie* the names of the competent parties.

Moreover, rules on arbitration should be understood in the context of possibilities for harmonisation. Thus an arbitration agreement should be classified as a *sui generis* contract under the 1958 New York Convention and rules on jurisdiction relating to arbitration and international private law can be inferred by analogy with the 1958 New York Convention.



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